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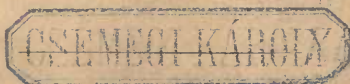
THE
SPEECHES
OF THE
RIGHT HON. LORD ERSKINE,
WHEN AT THE BAR,
AGAINST CONSTRUCTIVE TREASON,
&c. &c. &c.
WITH
A PREFATORY MEMOIR
BY THE
RIGHT HON. LORD BROUGHAM.

COLLECTED AND EDITED BY
JAMES RIDGWAY.

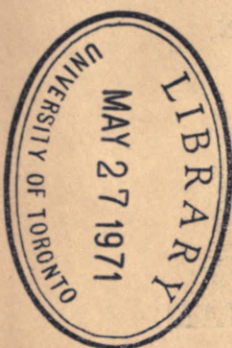
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VOL. IV.



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TRIAL OF THE EARL OF THANET,
AND OTHERS.

EVIDENCE FOR THE DEFENDANTS.

Mr. GEORGE SMITH sworn.—Examined by Mr. GIBBS.

Q. You were present at this trial ?

A. I was.

Q. The row in which the Solicitors sat represents that where we are now sitting, and the Counsel before us ?

A. It does.

Q. And the place in which the Prisoner stands was behind ?

A. Yes.

Q. In what part of the Court were you ?

A. Almost during the whole of the trial I sat in the Solicitors' seat.

Q. Are you at the Bar ?

A. I am.

Q. I believe the Prisoners stood in the place allotted for them, three in the front, and two behind ?

A. Exactly.

Q. Who were the three in front ?

A. Mr. O'Coigly, Mr. Binns, and Mr. O'Connor ;
Mr. O'Connor was on the left as he looked at the

Judges, and on the right as they looked at him ; Mr. Binns in the middle, and Mr. O'Coigly next the Gaoler ; my seat was directly under the Gaoler, at the end of the seat.

Q. Do you remember the time when the verdict was brought in ?

A. Perfectly.

Q. Did you observe any thing happen at that time ?

A. I recollect that Mr. O'Connor put his leg over the Bar, and there was a press behind me, but a very trifling one, to get at him.

Q. This was before sentence was pronounced ?

A. Before sentence was pronounced.

Q. Did that cease ?

A. Yes : silence was called, and that disturbance ceased. The Judge then proceeded to pronounce sentence ; I was at that time sitting, as I have described, at the end of the seat directly under the Gaoler ; and I leaned against a projecting desk, looking up at O'Coigly during the whole of the sentence, so that my back was to the Bow Street Officers : the instant that the Judge concluded his sentence, Mr. O'Connor put his leg over the Bar, and the Gaoler caught hold of his coat.

Q. At this time did you observe where Lord Thanet sat ?

A. At that particular moment I cannot say I saw my Lord Thanet, but I know that he and Mr. Browne were both sitting on the Solicitors' seat within one of me.

Q. Where was Mr. Fergusson at this time ?

A. I do not know; I did not observe him at that time.

Q. You were proceeding to state what passed after the sentence was pronounced.

A. At the same moment that Mr. O'Connor put his leg over the Bar, before I had recovered myself from the leaning position in which I sat, one of the Bow Street Officers, I am not sure whether it was Rivett or Fugion, *set his foot upon my back*. I immediately started up and drove the man off, and asked him what he meant.

Q. How did you drive him off?

A. With my elbow, and by starting up.

Q. What was his answer?

A. *He damned me*, and told me he had business, and would press on.

Q. Was there good room for him to get by, or was this a narrow place?

A. It was so narrow that it was impossible two people should pass without contrivance; a short struggle followed between the Officers and myself, for there were several people who were pressing behind, and I could not get out of the seat where I was without making that resistance.

Q. How did you get out at last?

A. At last I struggled a great while with my elbows to make room for myself; I got up, stepped upon the division between the Solicitors' and the Counsel's seats, and from thence to the table; I then turned round immediately, and I then saw the same man pressing upon my Lord Thanet, in the same way in which he had been pressing upon me.

Q. You said Lord Thanet and Mr. Gunter Browne were within one of you?

A. Yes.

Q. Did you observe this immediately upon your extricating yourself?

A. *The instant I extricated myself I turned round and saw a man pressing upon Lord Thanet*, with this difference, that when I resisted him, I did not observe that he had any staff or stick, but when I saw him with Lord Thanet *he was striking Lord Thanet with a stick*, but what the stick was I cannot say; Lord Thanet stood with a short stick in both his hands, dodging with his stick, and receiving the blows of the Bow Street Officer upon that stick.

Q. Lord Thanet was guarding himself, with his hands up, from Rivett's blows?

A. Exactly so.

Q. You do not know which Officer it was?

A. I am not certain, I think it was Rivett.

Q. Before this happened, Rivett had had a struggle with him?

A. I had had a struggle with Rivett in the first instance; and I should state, that during that struggle, Mr. O'Connor, who had endeavoured to get away, had effected his escape from the Gaoler; and the consequence was, that the people pressed forward from the opposite end of the bench, to prevent Mr. O'Connor from effecting his escape; by which means every person who sat in that narrow seat, was placed, if I may say so, between two fires; for the Bow Street Officers were pressing up from one side, and the crowd were pressing up from the other side.

Q. You say, as soon as you got from Rivett, you saw him *instantly engaged in this way with Lord Thanet*?

A. Yes.

Q. *Could Rivett, in the interval between the struggle with you, and the struggle you instantly saw him have with Lord Thanet, have got over to the Counsel's table, and had a contest with a man who had a stick, and taken that stick from him?*

A. *Impossible; I think so at least; the interval was no longer than that which elapsed from my getting from the seat to the division, and from thence to the table.*

Q. Which you did as expeditiously as possible?

A. Certainly; for I felt myself in danger.

Q. When you say impossible, I need not ask you whether you saw the thing happen?

A. Certainly not.

Q. *Had you your gown and wig on?*

A. *I had.* Very shortly after I got upon the table, a man took up one of the swords, and drew it, and flourished it about over the heads of the people; very shortly afterwards I saw this sword coming in a direction immediately to my own head; I avoided the blow by springing off the table into the passage leading into the street.

Q. *Did you at any time see Lord Thanet strike this Officer, let him be whom he may?*

A. *I never saw Lord Thanet in any situation but acting upon the defensive.*

Q. *If Lord Thanet had struck the Officer, do you think you must have seen it?*

A. Certainly ; during the time I had my eyes upon him.

Q. I think you told me you saw the Officer first pressing by Lord Thanet, and then striking him ?

A. Yes.

Q. And if he had struck the Officer, you must have seen him ?

A. Certainly, at that time.

Q. Do you remember Lord Romney coming down from the Bench ?

A. Perfectly well.

Q. Do you recollect, upon Lord Romney's saying the Prisoner was discharged, or acquitted, any person making an observation to him ?

A. I remember there was an altercation between Lord Romney and myself, in consequence of his saying that the Prisoners were not acquitted.

Q. There was a misapprehension between the words acquitted and discharged ?

A. I apprehend so.

Q. However, you were the person that had the conversation with him ?

A. Yes.

Cross-examined by Mr. ATTORNEY GENERAL.

Q. You insisted that they were acquitted, and Lord Romney insisted that they were not acquitted ?

A. Exactly so.

Jury. I wish to ask whether you left the Court during the riot ?

A. No, I did not ; I jumped off the table in consequence of a blow that I saw coming at my head, and I shortly after returned to the table again.

Q. Did you observe Lord Thanet leave the Solicitors' box ?

A. No, I did not.

Q. Do you know whether he did, or not, leave the Solicitors' box ?

A. I cannot say, for the riot lasted a very short time after I had left the table.

Lord Kenyon. Was the blow aimed at your head ?

A. By no means ; it appeared to me that all the blows struck by that sword were struck by a man that did not know what he was about.

Q. Were there any wounds ?

A. I heard there were, but I do not know of any.

Mr. BAINBRIDGE sworn.—Examined by Mr. BEST.

Q. You are a student of the law ?

A. I am.

Q. Were you in Court during the trials at Maidstone ?

A. I was.

Q. In what part of the Court did you sit at the time of the riot ?

A. When the Jury returned; I left my place at the table, and went to the place where the Solicitors of the Defendants sat, to speak to Mr. Fergusson ?

Q. Did you observe Mr. Fergusson during this time ?

A. Mr. Fergusson sat directly before me.

Q. Did you observe Lord Thanet ?

A. Lord Thanet sat on my right hand, close to me.

Q. So that you had a complete opportunity of observing them ?

A. I had a complete opportunity till the fray began.

Q. Do you recollect the Bow Street Officers coming in ?

A. I remember observing the Bow Street Officers standing on the right hand side of the dock.

Q. Do you remember seeing those Bow Street Officers at the time the Jury pronounced their verdict ?

A. I did.

Q. What did you observe them doing at this time ?

A. I observed two standing with their eyes fixed upon Mr. O'Connor, as the impression struck me.

Q. Do you recollect them after the sentence was pronounced ?

A. Yes, I do.

Q. What did you see them do at that time ?

A. I observed one, whom I had from observation upon the trial known to be Rivett, put his knee upon the bench that came over into the Solicitors' seat, and get over, and press directly forward.

Q. You say he pressed forward : in what direction ?

A. He pressed directly on to the bench where the Solicitors for the Defendants had sat, and the Counsel for the Defendants had sat.

Q. Where was Lord Thanet at this time ?

A. My Lord Thanet was on the right hand of me, and in the place where the Solicitor for Mr. O'Connor had sat, I believe most part of the day.

Q. Where was Mr. Fergusson then?

A. Directly before me, IN HIS PLACE.

Q. Was Mr. Fergusson at that time in the Solicitors' place, or the place appropriated for the Counsel?

A. Mr. Fergusson was IN HIS OWN PLACE, and the place which he had kept the whole day.

Q. Did you see the Bow Street Officers attempt to pass Lord Thanet?

A. I saw the Bow Street Officers attempt to pass Lord Thanet; and Lord Thanet, upon being pressed upon, moved upwards, as if to prevent being overpowered or crushed, and got upon his legs.

Q. Did Lord Thanet do any thing to obstruct this Officer?

A. To my opinion, nothing in the world.

Q. I think you say, on the contrary, he moved up?

A. He endeavoured to get upon his legs; for the pressure of the people upon him was such, that, if he had not got up, he must have been totally knocked under the bench.

Q. At this time did you see whether Lord Thanet struck this Bow Street Officer, or not?

A. I never observed Lord Thanet strike the Bow Street Officer, or any body else.

Q. From the situation in which you were at this time, if he had struck him, do you think you must have seen him?

A. Certainly I must.

Q. If Lord Thanet, at this time, had been taking an active part in the riot, must you have seen that also?

A. I must have observed that too.

Q. Did Lord Thanet do any thing to aid the escape of Mr. O'Connor, or add to the tumult which then prevailed in Court?

A. Nothing in the world, that I saw.

Q. Did you observe Mr. Fergusson at this time?

A. I did.

Q. Now, I will ask you if Mr. Fergusson struck any body?

A. I never saw Mr. Fergusson strike any body; and, if he had struck any body, I think I must have seen it.

Q. Did it appear to you that Mr. Fergusson encouraged Mr. O'Connor, or at all favoured him in his escape?

A. Not the least, quite the contrary.

Q. Did you observe whether Mr. Fergusson had any stick?

A. I observed no stick whatever.

Q. If Mr. Fergusson had at this time been brandishing a stick, do you think you must have seen it?

A. I must certainly have seen it, from the situation I was in.

Q. During this time did Mr. Fergusson continue in the same situation in which he was?

A. He continued in his seat till he was pressed upon, and the whole was a scene of confusion.

Q. Did it then appear to you that Mr. Fergusson only left his seat in consequence of the pressure upon him?

A. That was the only cause, as it struck me.

Q. *Do you recollect seeing Rivett engaged with Lord Thanet?*

A. *I do; he appeared to me to be striking him, and trying to beat him down; in short, he was in the act of offence, with his hand uplifted, as it appeared to me.*

Q. Do you recollect Mr. Fergusson saying or doing any thing at that time?

A. I remember Mr. Fergusson asking him to desist, and asking him if he knew who he was striking.

Q. Did he give any answer to that?

A. He, I think, made use of words to this effect:—"I neither know nor care." Upon which Mr. Fergusson said, "That is Lord Thanet, I insist upon your not striking him."

Q. Do you recollect whether Rivett had a contest with Mr. Fergusson before he got to Lord Thanet?

A. Not to my observation; I had seen none.

Q. From the situation in which Mr. Fergusson was, could Rivett have got a stick out of Mr. Fergusson's hand?

A. I think, if he had had a stick in his hand, he might; I observed no stick in his hand.

Q. Could he have struck him, and wrested the stick out of his hand, without your seeing it?

A. I think not.

Q. You was there during the whole of this tumult?

A. I was in Court during the whole of the trial.

Q. Was Mr. Fergusson any part of that time in the place allotted for the Solicitors?

A. Never.

Q. Was he ever nearer to Mr. O'Connor than the place for the Counsel?

A. Never; I was between them.

Q. Where did he go, when he quitted that place?

A. Towards the Judges, and away from the tumult.

Q. *During the whole of this time, did Mr. Fergusson at all appear to encourage the tumult?*

A. *Quite the contrary, I think.*

Cross-examined by Mr. LAW.

Q. You have said that Mr. Fergusson, so far from encouraging this tumult, acted quite the contrary?

A. Yes.

Q. Am I to understand you, that he endeavoured to dissuade them from riot?

A. *I heard him say to Mr. O'Connor, "Be quiet, and keep your place, nothing can hurt you."*

Q. Was that after the acquittal?

A. It was after the verdict of acquittal had been given, and before the sentence was passed upon O'Coigly.

Q. But after the sentence was pronounced, did you observe Mr. Fergusson doing any thing that was quite the contrary?

A. He seemed to say, "Be quiet;" and, from Mr. Fergusson desiring him to keep his place, and having complained to the Court of a person that wished to make a tumult, he appeared to me to be a person who wished to keep every thing quiet and in order.

Q. You have told us, that, during the whole day, Mr. Fergusson kept the same place?

A. As to the same place, I believe he might have moved to the right; he might have been, perhaps, to the right of Mr. Plumer in the morning; but what I mean is, that he never moved out of the place where the Counsel sat.

Q. Then he must have been under your own observation the whole of the day?

A. Yes.

Q. Did he never appear to be upon the table in the course of that day?

A. While the Jury were retired, he went across the table, and, I believe, went to speak to somebody near the witnesses' box; but at that time people were conversing and walking about, but there was no idea of a riot then.

Q. Will you say, after the verdict was brought in, he was never upon the table?

A. *He was never upon the table that I know of, till he was pressed upon by the Bow Street Officers.*

Q. Did you, during the day, see a stick in his hand, or that he had not had a stick?

A. I will swear that I did not see a stick in his hand.

Q. And you had him so much under your observation, that you must have seen it?

A. As much as a person could do, sitting in a Court of Justice; it was quite ridiculous to suppose he had a stick in his hand.

Q. Was you a witness, or concerned in that trial?

A. No. I went from mere curiosity.

Q. You did not go with Mr. Fergusson?

A. No.

Q. And you will swear that he never had a stick in his hand ?

A. I will swear I did not see a stick in his hand ; and I think I must have seen it, if he had.

Q. If you had him constantly in view, you must ?

A. It cannot be supposed that I had my eyes upon him for fourteen hours.

Q. WILL YOU VENTURE TO SWEAR, THAT DURING THE RIOT HE HAD NO STICK ?

A. I WILL.

Jury. Did Lord Thanet leave the Court during the riot ?

Q. Lord Thanet moved, as Mr. Fergusson did ; upon being pressed upon, he got up upon the bench ; and when he moved up, Rivett was above him, and trying to strike him ; and Mr. Fergusson then said, " Who are you striking, Sir ? "

Jury. Whether he saw Lord Thanet, during any part of the period, near the wicket-gate that leads to the narrow street ?

A. I saw Lord Thanet, I think, during the whole riot ; and I think, instead of being there, he went, when he did move, quite the contrary way, and not at all towards the gate.

Mr. Justice Lawrence. From Mr. Fergusson complaining of a tumult, it seemed as if he wished to keep every thing in order ; who was the person that he complained of ?

A. Rivett.

Q. That was before the sentence was passed ?

A. Yes.

Q. How far was Rivett from Mr. Fergusson at that time?

A. I think he must have been about three yards.

Q. At that time was he not making use of this motion (*describing it*), and saying, "Keep back, where are you going?"

A. Yes; and I think Mr. Justice Buller then said, "What is the matter?" Mr. Fergusson then said, "Here is a person making a noise, and will force himself into the Court." Mr. Justice Buller then said, "What do you mean, Sir?" He then said, "My Lord, I have a warrant against Mr. O'Connor." He then told him to keep back.

Mr. WARREN sworn.—Examined by Mr.
MACKINTOSH.

Q. I believe you was present at the trials for high treason at Maidstone?

A. I was.

Q. Was you present the second day of those trials?

A. I was.

Q. Where did you sit during the evening of the second day?

A. Just by the witness-box, opposite to the Jury.

Q. After sentence was pronounced upon O'Coigly, tell us what you observed of the confusion that arose in the Court.

A. After the sentence of death was pronounced upon O'Coigly, the first part of the affray that I recollect was this; Mr. O'Connor endeavoured to get out of

the dock ; he got almost out of the dock, on the left side ; the Gaoler, who was on the other side of the dock, reached across the dock, and caught him by the coat ; he detained him for a very short space of time in that situation ; the coat tore, or slipped through his hands.

Q. At that time, when the Gaoler had hold of Mr. O'Connor's coat, did any body reach or step backwards between them ?

A. Nobody.

Q. Then Mr. Fergusson did not ?

A. Certainly he did not. Mr. O'Connor got away, either from the coat being torn, or slipping through the Gaoler's hands ; he got down upon the ground ; he soon mixed with the crowd, and I lost sight of him ; as soon as he endeavoured at first to get away, two persons, who had before appeared to be Officers from Bow Street, with several others, rushed forward to apprehend him. In their endeavour to apprehend him, the first person upon whom they appeared to rush with any great violence, was Mr. George Smith, who was sitting at the end of the seat of the Solicitors for the Prisoners ; he was forced from thence, and came to the place where I was sitting. The next person that I observed forced from his seat, was Mr. Dallas, one of the Counsel for the Prisoners ; he came likewise and sat near me : the Officers still rushed on towards the end of the Counsel's seat, and of the Solicitors' seat. At the farther end of the Counsel's seat, or near the end of it, Mr. Fergusson was sitting, to the best of my recollection.

Q. Had he a stick in his hand?

A. No stick that I saw.

Q. Had you your eye upon him ; and if he had, must you have seen him ?

A. He is an acquaintance of mine, and he was in his professional dress ; and if he had, I think I could not have mistaken it. Lord Thanet was sitting upon the Solicitors' bench, almost immediately behind Mr. Fergusson. By this time the confusion had become general, and a number of people had got upon the table, from all parts of the Court.

Q. If Mr. Fergusson had brandished a stick, or presented it to Rivett, must you have seen it ?

A. I certainly must.

Q. I need not ask you if you did see it ?

A. I did not see it : Mr. Fergusson had risen up, and Lord Thanet had risen up.

Q. Supposing it possible that a stick had been in Mr. Fergusson's hands, and it had escaped your eye, do you think it possible, from time and place, that Rivett could have wrenched it out of his hands before he attacked Lord Thanet ?

A. I do not think it possible he could have a stick of any sort.

Q. Was Lord Thanet nearer to Rivett than Mr. Fergusson ?

A. I think he was rather ; one of the Officers, but I do not know which, I do not know their persons, pressed very rudely, as it appeared to me, upon Mr. Fergusson ; I believe that Mr. Fergusson might shake his shoulder when he felt the man's hand upon it ; that

is all the resistance I saw made on the part of Mr. Fergusson.

Q. What did you see pass between these Officers and Lord Thanet ?

A. The first thing I observed particularly of Lord Thanet was, that he was lying almost down upon his back upon the table, with a small stick or cane, which he held in both hands over his head or face, in this manner : one of the Officers was striking him with a stick, and Lord Thanet endeavoured, with very little success, to defend himself by the use of this stick, which he held in both his hands.

Q. Now, before that period of which you last spoke, did you observe Lord Thanet give a blow, or any provocation, to this Officer ?

A. I never saw him give a blow ; I never saw him give any provocation ; I never saw him in any other way than I have mentioned, till he left his seat ; how he left his seat I cannot tell ; they had risen up upon their seats ; when they were pressed upon, they rose towards the left hand side of the Prisoner, as the Prisoner faced the Judges.

Q. Did they go out of sight ?

A. No.

Q. Did they go off that table ?

A. They were not upon that table ; Mr. Fergusson was upon the table afterwards, but not on the table at any time that I have yet spoke to—Lord Thanet was then lying upon the table. I am not able to say how Lord Thanet got from that situation ; I do not know that I took particular notice of what passed after, with

respect to Lord Thanet; Mr. O'Connor was brought into Court, and then the riot ceased.

Q. Did you take any particular notice of Mr. Fergusson, between the last time you have been speaking of, and the time of Mr. O'Connor being brought into Court?

A. No: I do not recollect any thing more.

Q. I need not ask you if you saw Mr. Fergusson brandish a sword?

A. No.

Q. Did you see Mr. Fergusson, after the sentence of death was passed, go back to his old place?

A. I did not.

Q. Were your eyes fixed upon that part of the Court?

A. They were, most particularly; I was placed in a situation in which I could very well see.

Q. So that it was impossible for Mr. Fergusson to have gone backwards from his seat, without having struck your eye?

A. I think it was impossible.

Q. *Did you see Mr. Fergusson upon the table, before Lord Thanet was beat by Rivett?*

A. *I did not.*

Mr. Justice Lawrence. In what part of the Court was you?

A. Under the witness-box; I rose from thence, and got upon the table, as other people did.

Mr. Mackintosh. Did you see Lord Thanet or Mr. Fergusson take any part in any thing that had the appearance of disturbance or riot?

A. No; I did not. I saw Lord Thanet defend himself; and I have stated, that I did not see Mr. Fergusson do any act at all, except shaking that man's hand off his shoulder.

Q. Do you remember Mr. Dallas quitting his place before he began to address the Jury?

A. I do, perfectly.

Q. And Mr. Plumer also, I believe?

A. I do not.

Q. Do you recollect Mr. Fergusson leaving his own place, in consequence of that?

A. I am rather inclined to think it was so; but I cannot swear to that.

Q. I understand you to swear most positively that Mr. Fergusson never interposed between the Gaoler and Mr. O'Connor?

A. I do most positively swear I do not think he did; and if he had, I think I must have seen it.

Cross-examined by Mr. GARROW.

Q. The Dock or Bar, by which the Bow Street Officers were placed, could only occupy five or six persons?

A. No more.

Q. Only the Gaoler and the Prisoners?

A. It might be three yards long, perhaps.

Q. You stated that after the sentence of death had been passed, and Mr. O'Connor had been left upon the floor, the Officer pressed forward to apprehend him—

What induced you to think these were Officers rushing forwards for that purpose?

A. I took them to be the persons who had produced the warrant in Court. When they had forced themselves up to the end of the Solicitors' seat, Mr. Fergusson said, I think, "Here are two men obtruding themselves between the Prisoners and the Jury." Mr. Justice Buller said, "What are you about? sit down;" and one of them produced a paper, saying either that it was a warrant to take up Mr. O'Connor, or a warrant upon a charge of high treason against Mr. O'Connor, or something to that effect; and, therefore, I supposed them to be Bow Street Officers, or Officers of Justice.

Q. I do not know whether you happened to be present in Court when those two witnesses were examined as witnesses to prove the fact of apprehending Mr. O'Connor at Margate?

A. I should suppose I was in Court, but I am not certain.

Q. But before the judgment of death was passed, it is perfectly in your recollection that one of those persons had hinted in Court, that they had a warrant for the purpose of apprehending Mr. O'Connor?

A. That was after the Jury had returned their verdict, and before that verdict was pronounced.

Q. Do you know Mr. O'Brien?

A. I saw him the other day for the first time in my life.

Q. You did not know him at Maidstone?

A. No; I did not.

Mr. MAXWELL sworn.—Examined by Mr. ERSKINE.

Q. Was you in Court, at Maidstone, during any part of the trial of Mr. O'Connor and others?

A. I was, frequently.

Q. Did you hear Mr. Justice Buller pronounce sentence of death upon O'Coigly?

A. I did.

Q. In what part of the Court was you at that time?

A. At that time I was immediately to the left of the witness-box, rather farther from the Judge than the witness-box.

Q. Was you elevated above the Court?

A. I was elevated above the table where the Counsel sat.

Q. Did that elevation and position give you a view of that part of the Court where the Bow Street Officers entered, and where the Solicitors for the Prisoner sat?

A. That gave me a distinct view of that part of the Court.

Q. Do you remember when Mr. Justice Buller had finished pronouncing sentence upon Mr. O'Coigly—do you remember any persons rushing forwards, as if to seize Mr. O'Connor?

A. I remember some of the Bow Street Officers, among whom I knew Rivett and Fugion, rushed violently to that place where Mr. O'Connor was.

Q. At the time that those two persons, Rivett and Fugion, rushed forwards in the direction you have described, did you observe where Lord Thanet was?

A. I did; my Lord Thanet sat at that time in the Solicitors' place.

Q. Did you observe where Mr. Fergusson was at the same time?

A. Mr. Fergusson sat in his own place, where he had been as Counsel for some time, on the Bench before the Solicitors' bench.

Q. Which of them was nearer to that side of the Court where the Jury-box is, and where Mr. O'Connor was?

A. I think Lord Thanet was rather, perhaps, the nearest of the two; but there was very little difference.

Q. Did you see any thing pass between Rivett, the officer, and Lord Thanet?

A. I did.

Q. Describe to my Lord and the Jury what you saw.

A. After Rivett had forcibly overturned and driven from their places those who stood between him and Mr. O'Connor, he got to Lord Thanet, who was one of the nearest. Lord Thanet, when he was pressed upon, got out of the place where he was, and went from the scene of tumult towards the table.

Q. Was that farther from the Prisoners than he was before?

A. Considerably farther from the Prisoners than when he was first pressed upon.

Q. When Lord Thanet retired in that manner out of the Solicitor's box, over towards the Counsel's table, did Rivett pursue his course on towards the Prisoners in the line of the Solicitors' box, or how else?

A. He followed Lord Thanet, and struck him repeatedly.

Q. Had Lord Thanet struck Rivett before he went over from the Solicitors' seat towards the table?

A. Lord Thanet never struck Rivett before nor after that.

Q. Had you such a view of the situation in which Lord Thanet was placed, and what he did, as to swear merely to your opinion and belief, or do you swear it positively?

A. I had such a view, that I swear it positively; by that time I had quitted the place where I was, and got nearer to Lord Thanet and the other persons who were struck.

Q. Were any other persons struck besides Lord Thanet?

A. I saw several blows given, but I cannot say to whom, by the Bow Street Officers and those who followed them.

Q. Do you know whether Rivett struck any person besides Lord Thanet?

A. I do not positively know whether he struck any person or not.

Q. But you swear positively Lord Thanet did not strike Rivett at all?

A. He did not; but merely put himself in a posture of defence, and lying back upon the table.

Q. Had Lord Thanet a stick?

A. He had a small stick; which he held up over his head to defend himself; he was leaning back upon

the table, an attitude in which it would have been difficult to have acted offensively.

Q. Did you see Lord Thanet subsequent to the time that he was in that situation ?

A. I did.

Q. You say that the Officers, and particularly Rivett, rushed into the Court, and having passed one or two that were before Lord Thanet, attacked Lord Thanet ; *what length of time might elapse between Rivett first rushing in and the time he struck Lord Thanet ?*

A. *A very short space of time indeed.*

Q. *Was it possible that before Rivett struck Lord Thanet he could have gone within the Counsel's place, where you have described Mr. Fergusson to be, and have wrested a stick out of his hand before he came to Lord Thanet ?*

A. *Rivett did not go to take a stick out of his hand, for he had no stick in his hand ; he did not go up to Mr. Fergusson, but immediately went up to Lord Thanet and struck him.*

Q. *If Rivett should have said here, that he never saw Lord Thanet till after he had taken a stick from Mr. Fergusson, from what you observed, is that true or false ?*

A. *I should certainly say it was false, without any hesitation.*

Q. During the time that you thus observed Lord Thanet in the attitude of defence, retreating from the scene of tumult, and pursued by Rivett, where was Mr. Fergusson ?

A. He was in his place, and remained in his place

till he was pressed upon, and then he got out of the scene of tumult upon the table.

Q. Did you see him while he was in his seat, and did you see him move from his seat to the table by the pressure that was upon him ?

A. I did.

Q. If whilst Mr. Fergusson was in his seat, or if while he was pressed upon when he rose from his seat, if in either of these situations he had not only had a stick, but had brandished and flourished that stick, I ask, must you have seen it or not ?

A. I must have seen it ; he was so directly before me, that it is quite impossible but I should have seen it ; I CAN SWEAR THAT MR. FERGUSSON HAD NOTHING IN HIS HAND, BUT A ROLL OF PAPER IN HIS RIGHT HAND.

Q. And was in his professional dress ?

A. He was.

Q. If Mr. Fergusson had done any one act to encourage the tumult that was undoubtedly then existing, or done any one act inconsistent with his duty as Counsel, or committed any one act of indecency or turbulence, must you have seen it ?

A. I must.

Q. Then let me ask you, upon your solemn oath, did he do any such thing ?

A. He did not ; on the contrary, he endeavoured to keep quiet in the Court, by admonishing the people in Court to be quiet. Mr. Fergusson said particularly to Rivett, when he was striking Lord Thanet—"Do you " know who you are striking ?" That is not a person likely to begin a riot.

Q. Did you see where Mr. Fergusson went to after he was upon the table?

A. He got upon the table, and got farther from the scene of tumult; and I do not know whether he sat down upon the table or not; he went towards the Crown Lawyers.

Q. Did you see Sir Francis Burdett?

A. I did. He at first stood by me in the witness-box, and when the confusion began, he got nearer to the place of confusion at the same time that I did. I saw Mr. Fergusson remove Sir Francis Burdett from the scene of confusion, and put him farther from it.

Q. And you saw him also place himself at a distance from it?

A. Yes.

Q. Did you afterwards see him go upon the table towards the Judges?

A. I did; I saw him till all the violence was over.

Q. Then can you take upon you to swear positively that neither Mr. Fergusson nor Lord Thanet, during the tumult, went towards Mr. O'Connor?

A. They went in a directly opposite direction.

Q. Do you swear that from your own opinion and belief, or from certain knowledge?

A. I swear it positively from certain knowledge.

Cross-examined by Mr. ADAM.

Q. You saw Rivett and Fugion pressing forward?

A. I did.

Q. Did you know them before?

A. I knew them from having seen them examined in Court upon that trial.

Q. Only from that circumstance?

A. Only from that circumstance.

Q. During this affray you shifted your situation to another part of the Court?

A. Yes; I got upon the table.

Q. And you say you saw Sir Francis Burdett shift his place?

A. He shifted his place at the same time.

Q. From what part of the Court did he come?

A. From the witness-box; he stood on my right hand.

Q. To what part of the Court did he go?

A. He also went on to the table.

Q. Do you mean that he remained upon the table?

A. I cannot say whether he remained upon the table, but he went there with me.

Q. Did he remain on the table any considerable time?

A. The tumult was over very soon after that.

Q. The Counsel for the Crown sat immediately under the witness-box?

A. They sat on the same side.

Q. Round the angle?

A. Yes.

Q. Therefore, it was necessary when you and Sir Francis Burdett shifted your places, that you should go over the heads of the Counsel for the Crown, to get to the table?

A. Exactly so; we jumped from the neighbourhood of the witness-box.

Q. Do you remember when Sir Francis Burdett jumped from the neighbourhood of the witness-box to the table, did he not jump immediately from the table into the crowd ?

A. I cannot say whether he did or not ; but I saw him standing upon the side of the table, or sitting upon the side of the table, till Mr. Fergusson removed him.

Q. But that was near the conclusion of the affray ?

A. It was.

Q. What circumstance was it that brought you to Maidstone ?

A. Merely to be present at the trials.

Mr. Erskine. You are a gentleman possessing an estate in Scotland ?

A. Yes.

Q. And I believe married a daughter of Mr. Bouverie ?

A. Yes.

Lord Kenyon. Did you see Mr. O'Connor go out of the dock ?

A. Yes.

Q. How soon was he out of your sight ?

A. I do not know that he was out of my sight.

Q. Do you know the situation of the wicket ?

A. Yes.

Q. Where were Mr. Fergusson and Lord Thanet during the time that elapsed between his leaving the Bar and being brought back again ?

A. Upon the table.

Q. Did the crowd coming upon them prevent you from seeing them ?

A. No: I was so situated that I saw them both distinctly ; I was a great deal higher than they.

SAMUEL WHITBREAD, *Esq. sworn.—Examined by*
Mr. GIBBS.

Q. You were present, I believe, at the time of this trial ?

A. I was in Court the latter part of it, after I had been examined as a witness.

Q. In what part of the Court were you ?

A. After having been examined as a witness I retired out of the witness-box, behind, and came into the Court again.

Q. Whereabouts was you when the verdict was brought in ?

A. Considerably behind the witness-box.

Q. Had you from thence a perfect view of the Court ?

A. Of the lower part of the Court.

Q. Had you a perfect view of the dock in which the Prisoners were, the Solicitors' seat, and the seat where the Counsel sat ?

A. I had certainly a view of the whole of that part of the Court.

Q. Between the verdict and the sentence we understand some Bow Street people came in, and spoke of a warrant ?

A. There was some tumult, and that subsided upon Mr. Fergusson calling the attention of the Court to the cause of it. He waved his hand and spoke to them ; he then turned to the Bench, and said, " My

Lord," or some such word, just to draw the attention of the Court: upon that, Rivett, whom I knew before, said he had a warrant against Mr. O'Connor, and he thought he was going to escape. Mr. Justice Buller then said, "Patience," or some such word; and then sentence was pronounced.

Q. After sentence was pronounced, did you observe O'Connor?

A. I observed him put his foot upon the front part of the dock, and get out of the dock: having carried my eye after him some time, my eye returned to the Bar, and there I saw Rivett violently attacking Lord Thanet; he had a stick in his hand: I did not see *him* strike a single blow; I saw many blows struck at him, and he was endeavouring to ward them off.

Q. Did it appear to you that Lord Thanet made any attack upon Rivett to provoke this?

A. No; on the contrary, he was defending himself against a violent attack of Rivett's upon him?

Q. Where was Lord Thanet at the time that you observed this?

A. I think he was close to the table, leaning back upon the table in the act of defending himself, with his hands up, in which I think he had a stick.

Q. Did you see at this time where Mr. Fergusson was?

A. I did not observe Mr. Fergusson at that time: before the tumult had quite subsided I observed Mr. Fergusson upon the table, not far from the Judges.

Q. Had you your eyes upon Lord Thanet from the time you saw Rivett striking him in this way?

A. No, I had not, because there was a great deal of tumult behind, and of persons trying to get out at the door behind the Bench, and the bailiffs resisting their attempts, which engaged my attention some time.

Q. Did you see Mr. O'Brien during this time?

A. I do not recollect that I did.

Q. Did you know Mr. O'Brien well?

A. I knew him perfectly by sight.

Q. If he had been acting in this scene, must you have noticed it?

A. In a scene of confusion many things must have escaped the observation of every person; but I think it is more than probable that I must have seen such a person as Mr. O'Brien, if he had been active?

Cross-examined by Mr. ATTORNEY GENERAL.

Q. How long did you remain at Maidstone?

A. The next morning, I think, I passed you on the road to London.

Mr. Attorney General. I beg your pardon, I did not recollect that circumstance.

Q. Previous to the Officers approaching the place where Mr. O'Connor was, had you heard that there was to be a rescue?

A. I had not.

RICHARD BRINSLEY SHERIDAN, *Esg. sworn.*—

Examined by Mr. ERSKINE.

Q. You were subpoenaed as a witness to attend the trials at Maidstone?

A. I was.

Q. Were you in Court at the time when the Jury retired to consider of their verdict, and also when they returned with it ?

A. I was.

Q. And during the remaining part of the time till the tumult ceased ?

A. During the whole of that time.

Q. In what part of the Court were you when the Jury brought in their verdict ?

A. Sitting with Sir Francis Burdett in the witness box ; that box was raised very considerably above the table, so that I had a direct view of every thing passing in the Court.

Q. Had you then an opportunity of perfectly observing the place where the Solicitors sat, and the dock where the Prisoners were, and the place where the Counsel were ?

A. A most perfect opportunity, without being in the least annoyed or mixed with the tumult.

Q. Do you remember the Jailor laying hold of Mr. O'Connor ; perhaps you did not see that ?

A. The first that I observed of the tumult was prior to the sentence being passed upon O'Coigly ; I did not see Mr. O'Connor make an attempt to go, but I had observed to the High Sheriff that I fancied he would come out, for that I had observed at the Old Bailey, that they had left the Bar immediately upon the Jury pronouncing them Not Guilty. The riot then commenced, and I observed some men pressing very violently towards the box where Mr. O'Connor was ; my

attention was taken up with that : Mr. Fergusson then appealed to the Court, and said, " Here are two riotous fellows," or something of that sort, " disturbing the peace of the Court." Rivett then said, " I have a warrant to apprehend Mr. O'Connor." Mr. Justice Buller desired him to be quiet, and then put on his cap to pass sentence, and every thing subsided.

Q. After that did you observe the Bow Street Officers rushing in, in the way that we have heard ?

A. The first thing I saw was Mr. O'Connor getting very nimbly over the front of the dock, and going towards the narrow street, and these men rushing after him. Certainly the man who could have thrown himself most in the way of the men, was Mr. O'Brien, if he had chosen to do it.

Q. Are you acquainted with Mr. O'Brien ?

A. I know him intimately.

Q. Is he a strong man ?

A. Certainly he is.

Q. If Mr. O'Brien had been desirous of opposing himself to the Officers, and to prevent them from going after him, might he ?

A. He was precisely in the best situation to have done it.

Q. Had you an opportunity of seeing whether he did or not ?

A. He did not, and I am sure he was not there in the subsequent part of the tumult.

Q. Can you take upon yourself to swear positively that he gave no manner of assistance ?

A. Positively.

Q. And Mr. O'Brien had an opportunity of affording the most essential means of escape to Mr. O'Connor if he had chosen ?

A. I think the whole idea was folly and madness, and that no assistance could have effected it.

Q. But Mr. O'Brien did the contrary ?

A. Yes ; he retired behind the box, and I did not see him afterwards. I was very attentive to the whole of it, and was making my observations with the High Sheriff, who more than once endeavoured to persuade me to leave the witness-box, and endeavour to quell it.

Q. Did you see Lord Thanet at the time the Officers rushed in ?

A. I did not see him till the time he was struck ; I saw him struck.

Q. Did he return the blow, or show any thing like activity, or a disposition to activity ?

A. I saw him when he was first pressed upon. It was not a tumult merely near the dock, but the whole Court was a scene of general tumult, and a scene of panic, and certainly with the least reason—there was a tumult behind us in the witness-box ; there was a general calling out not to open the doors, some calling out for soldiers and constables, and there did appear to me a sincere panic and apprehension that there was a planned rescue. I perceived plainly there was no such thing, and endeavoured all I could to persuade them so. The Officers were beating down every body, forcing their way and pressing upon every body. Lord Thanet had a stick in his hand with which he was parrying the blows, which came amazingly quick ; it

seemed to me an incredible thing that he was not extremely hurt, and he never returned a blow, but retired from the scene of tumult farther into the Court away from the Prisoners; Sir Francis Burdett was with me; and by this time Mr. O'Connor was stopped, and they were bringing him back again; he had attempted to go towards the gate with the wicket, and I observed every body to put up their hands and stop him; he might as well have attempted to get through a stone wall; if there had been six or eight persons there who were so disposed, he might perhaps have got as far as the door, but he could not possibly have got farther. I then saw a person upon the table, brandishing Mr. O'Connor's scimitar over the heads of the people; he seemed very much alarmed, and not knowing what he was about; I am sure it must have gone very near several persons' heads, it seemed quite miraculous that he did not do some mischief; in short, it was difficult to discover whether he meant to keep the peace or break the peace. Sir Francis Burdett saw that they had collared Mr. O'Connor, was frightened, and said with great agitation to me, that they would kill O'Connor, and he jumped over the railing; he could not go from where we were without jumping upon the table, and he ran forward; Mr. Maxwell followed him, or went at the same time; they both went towards Mr. O'Connor; I then saw very distinctly Mr. Fergusson stop Sir Francis Burdett, and use some action, saying, "You had better keep away, and not come into the tumult at all:" I could not hear what he said, but it appeared so to me.

Q. Did you see Mr. Fergusson from the beginning of this scene, when sentence of death was pronouncing?

A. I saw him plainly in his place, after the Judge had passed sentence of death.

Q. Did you see the crowd press upon Mr. Fergusson, and did you see him get upon the table?

A. I did not see him get upon the table; but as the crowd pressed upon him, he was forced upon the table.

Q. Did Rivett attack Lord Thanet before he could possibly have attacked Mr. Fergusson, and wrenched a stick out of his hand?

A. He came immediately upon Lord Thanet, when the tumult began.

Q. He could have had no conflict with Mr. Fergusson till after the conflict with Lord Thanet?

A. Certainly not.

Q. Do you know Mr. Fergusson?

A. Perfectly.

Q. If he had been upon the table flourishing and waving a stick, in the manner that has been described, in his bar dress, must you not have seen it?

A. Yes; it must have been a most remarkable thing, indeed, for a Counsel in his bar dress to have a stick flourishing in his hand—HE HAD A ROLL OF PAPER IN HIS HAND.

Q. Does that enable you to swear that Mr. Fergusson was not in that situation?

A. Certainly.

Q. Do you think if he had taken such a part in the riot, in the presence of the Judges, that you must have observed it?

A. I must have observed it.

Q. Did Lord Thanet or Mr. Fergusson ever go nearer to Mr. O'Connor after he had jumped out of the dock, or did not Lord Thanet and Mr. Fergusson retire farther from the scene of tumult?

A. They certainly did :—Upon some farther conversation I got over this place myself, and went down, and the first thing I did was to speak to the man with the sword. I told him I thought he with his sword made half the riot himself; and he put it away. I passed Lord Thanet, who, so far from staying in the riot, went towards the Judges, as if he was going to make a complaint. I then went into the riot, and endeavoured to persuade them that there was no such thing as an attempt to rescue O'Connor; and a man that had hold of him, who knew me, said there was; and added, "These fellows are come down from London; they are Corresponding Society people, and "they are come down on purpose to rescue him." One person in particular called to them not to believe me, and I laid hold of him, and said he should go with me to Mr. Justice Buller; I insisted upon his name and address, and he would not give it me. I then turned to the Judges, and he ran away. So far was Lord Thanet from going towards the wicket, that I passed him going up to the Judges; and Mr. Fergusson remained with me, desiring them not to treat Mr. O'Connor so, and generally endeavouring to quiet them; the only moment they were out of my eye was while I was getting over this place.

Cross-examined by Mr. LAW.

Q. You saw Lord Thanet distinctly from the time he was struck ?

A. I do not mean with the stick :—I corrected that by saying, from the time he was assaulted and driven from the seat he was in at first.

Q. Can you take upon you to say whether he gave a blow before he was struck ?

A. I said from the time he was pressed upon or assaulted.

Q. You say you saw Lord Thanet going towards the Judges, as if he was going to complain—Did you hear him make any complaint to the Judges ?

A. I did not hear him, certainly.

Q. I will ask you, whether you do or do not believe that Lord Thanet and Mr. Fergusson meant to favour O'Connor's escape, upon your oath ?

A. Am I to give an answer to a question which amounts merely to opinion ?

Q. I ask, as an inference from their conduct, as it fell under your observation, whether you think Lord Thanet or Mr. Fergusson, or either of them, meant to favour Mr. O'Connor's escape, upon your solemn oath ?

A. Upon my solemn oath I saw them do nothing that could be at all auxiliary to an escape.

Q. That is not an answer to my question.

A. I do not wish to be understood to blink any question ; and if I had been standing there, and been asked whether I should have pushed or stood aside, I should have had no objection to answer that question.

Q. My question is—Whether, from what you saw of the conduct of Lord Thanet and Mr. Fergusson, they did not mean to favour the escape of O'Connor, upon your solemn oath ?

A. The Learned Counsel need not remind me that I am upon my oath : I know as well as the Learned Counsel does, that I am upon my oath ; and I will say that I saw nothing that could be auxiliary to that escape.

Q. After what has passed, I am warranted in reminding the Honourable Gentleman that he is upon his oath—My question is, Whether from the conduct of Lord Thanet or Mr. Fergusson, or either of them, as it fell under your observation, you believe that either of them meant to favour O'Connor's escape ?

A. I desire to know how far I am obliged to answer that question. I certainly will answer it in this way, that from what they did, being a mere observer of what passed, I should not think myself justified in saying that either of them did—Am I to say whether I think they would have been glad if he had escaped, that is what you are pressing me for.

Q. No man can misunderstand me ; I ask Whether, from the conduct of Lord Thanet or Mr. Fergusson, or either of them, as it fell under your observation, you believe upon your oath that they meant to favour the escape of O'Connor ?

A. I repeat it again, that from what either of them did, I should have had no right to conclude that they were persons assisting the escape of O'Connor.

Q. I ask you again, whether you believe, from the

conduct of Lord Thanet or Mr. Fergusson, or either of them, upon your oath, that they did not mean to favour the escape of O'Connor?

A. I have answered it already.

Lord Kenyon. If you do not answer it, to be sure we must draw the natural inference.

Mr. Sheridan. I have no doubt that they *wished* he might escape; but from any thing I saw them do, I have no right to conclude that they did.

Mr. Law. I will have an answer:—I ask you again, whether from their conduct, as it fell under your observation, you do not believe they meant to favour the escape of O'Connor?

A. If the Learned Gentleman thinks he can entrap me, he will find himself mistaken.

Mr. Erskine. It is hardly a legal question.

Lord Kenyon. I think it is not an illegal question.

Mr. Law. I will repeat the question, Whether, from their conduct, as it fell under your observation, you do not believe they meant to favour the escape of O'Connor?

A. My belief is that they *wished* him to escape; but from any thing I saw of their conduct upon that occasion, I am not justified in saying so.

Q. I will ask you, whether it was not previously intended that he should escape if possible?

A. Certainly the contrary.

Q. Nor had you any intimation that it was intended to be attempted?

A. Certainly the contrary. There was a loose rumour of another warrant, and that it was meant that he

should be arrested again, which was afterwards contradicted. Then the question was mooted, whether the writ could be issued before he was dismissed from custody? Certainly there was no idea of a rescue. There was no friend of Mr. O'Connor's, I believe, but saw with regret any attempt on his part to leave the Court.

Q. From whom did you learn that there was such a warrant?

A. It was a general rumour?

Q. From whom had you heard this rumour?

A. I believe from Sir Francis Burdett; but I cannot tell.

Q. At what time was that?

A. About four or five o'clock.

Q. Have you ever said that the Defendants were very blameable; Lord Thanet, Mr. Fergusson, or any of them?

A. Certainly not.

Q. At no time since?

A. Certainly never.

Mr. Erskine. You were asked by Mr. Law, whether you believed that the Defendants wished, or meant, to favour the escape of Mr. O'Connor; *I ask you, after what you have sworn, whether you believe these Gentlemen did any act to rescue Mr. O'Connor?*

A. *Certainly not*; and I have stated upon my oath, that every man in the narrow gateway endeavoured to stop him: I remarked it particularly; because, there being a common feeling amongst Englishmen, and he being acquitted, I thought they might form a plan to let him escape.

Q. You have stated that you saw no one act done or committed by any one of the Defendants, indicative of an intention to aid O'Connor's escape?

A. Certainly.

Q. I ASK YOU THEN, WHETHER YOU BELIEVE THEY DID TAKE ANY PART IN RESCUING MR. O'CONNOR?

A. CERTAINLY NOT.

End of the Evidence for the Defendants.

MR. ATTORNEY GENERAL.

GENTLEMEN OF THE JURY,

AT this late hour of the day, I do not think that the duty which I owe the public can require me to detain you any considerable time in reply to the observations of my Learned Friend.

Gentlemen, my Learned Friend has addressed you with great ability; and unquestionably with great but guarded zeal on behalf of his Clients;—this his duty called upon him to do; for certainly the best exertion of his great abilities was due to them. On the other hand, your attention is now to be occupied by a person who must address you upon principles which forbid him to have any zeal upon the subject.

The Attorney General of the country, as it appears to me, has a public duty to execute, in reference to which he ought to conceive, that he has properly executed that duty, if he has brought a fit and proper accusation before a Jury, and has proceeded to the length of honestly and fairly examining the several

circumstances given in evidence in support of, and in answer to, that accusation; always recollecting that the Jury will finally hear, from that wisdom which cannot mislead them, the true inferences that will arise upon facts which have been given in evidence on both sides. They will hear it from a person unquestionably less prejudiced than I can be (though I have endeavoured as much as possible to guard myself against any prejudice), because it belongs to the mind of man to be influenced by circumstances, which one's duty as a prosecutor obliges him to look at a little anxiously.

Gentlemen, having been charged with the duty of laying this important case before you, I have not the least doubt but you will discharge the duty which is now imposed upon you with a full and conscientious regard to justice; and I dismiss here all the observations my Learned Friend has made upon the high rank and situation of Lord Thanet, upon the respectable situation in his profession of Mr. Fergusson, and of the situation of Mr. O'Brien; because it is quite enough for me, according to my sense of duty, to say this, that, as a Jury sworn to make a true deliverance, you are not to convict any of them, whatever rank or situation belongs to them, unless you are conscientiously satisfied that they are guilty. You will deliver the same verdict that you would between the King and Defendants of any other description.

Gentlemen, what has fallen from the last witness obliges me to take the character of the proceeding which gives rise to the cause, from his friend; who, when he was addressing you, in the course of this

afternoon, said, and truly said, that such a proceeding in a Court of Justice, which the last witness represented as an idle panic, most loudly called for the interposition of the law. That witness may have represented those transactions, as I have no doubt he did, as it seemed just to him to represent them. Certainly I was not personally present; but I was within hearing, and I can say that that gentleman is a man of stronger nerves than any other man in this country, if the representation he has given of this scene is a true one. By a true one, I do not mean that it is not one that the gentleman believes to be true; but the evidence of Mr. Justice Heath gives it a character which I believe every man in the county of Kent who was present would give it, namely, that it was a proceeding utterly inconsistent with the safe administration of justice; that it was attended with a degree of indecency and tumult that was never witnessed in a Court of Justice before, and I trust never will be witnessed in a Court of Justice again.

Gentlemen, having no anxiety about the fate of this or any other cause, except so far as it is fit for me to have an anxiety founded upon the public interests, whenever this cause comes to its conclusion, I think the Noble Peer, the Defendant, who holds a situation high in this country, ought to join with all his fellow-subjects in thankfully acknowledging, that the Attorney-General, having reasonable accusing evidence to lay before a Jury (whether it is satisfactory to their minds is another consideration), should show to the country that transactions of this sort shall not be carried on,

without being brought under the notice of a Court of Justice.

Gentlemen, accusations of all sorts are tried in this country with great propriety; but if you acquit a man of treason, is a man to start up and say, that the public are to be indignant, because another warrant has been issued against him? I remember in this very Court, in the last cause that was tried here at Bar, my Lord exerted himself with great vigour, by taking immediate notice of such an insult as was then offered to the Court. My Learned Friend says, why did not the Judges, who were present, do their part, by taking notice of the fact at the moment? I will give the answer to that:—The Judges of the country are but men. Although they are placed in high, judicial, and honourable situations, yet they are placed in situations in which they are to see that their conduct is not only the best that they can pursue, but, when they proceed to acts of punishment, that their conduct is perfectly adapted to the subject with which they are dealing. If the five Judges upon the Bench had seen this as an idle panic, perhaps those Judges would have treated it as an idle panic. But how does Mr. Justice Heath, upon whom my Learned Friend relies so much—how does he mention the scene that was passing? He says that he never witnessed such a scene before. My Learned Friend says, I might have called another Learned Judge as a witness; but when I call witnesses who are above all suspicion, men as honourable as any men in this country, to state to you all that that Learned Judge would have had to state to you, I think

I shall have acted neither unfitly for the public, or the Defendants. But with reference to that conversation (upon which I must farther observe by and by) that has been stated by Mr. Solicitor General and by Mr. Abbot, to have passed between Mr. Justice Lawrence and Lord Thanet, I should be glad to know, what foundation there is for the reasoning of my Learned Friend, that Mr. Justice Lawrence ought to have committed or attached Lord Thanet. I think I am entitled, under the circumstances of the evidence in this case, to represent him as perfectly ignorant of those causes which occasioned so much confusion in the Court.

Mr. Erskine. I never meant to say so.

Mr. Attorney General. My Learned Friend certainly did not state it exactly in these words ; but he will, I am sure, excuse me for putting him in mind of the expression he made use of, and I shall now endeavour to repeat the very words he used : “ Mr. Justice Lawrence, instead of asking Lord Thanet to do him “ a kindness, should have attached him.”

My Learned Friend will not, I am sure, interrupt me again ; for when I take notice of any thing that is said in so able a defence, I do not mean to lay it down that Counsel are to be responsible for every expression that hastily falls from them ; but expressions may have an application which I feel it my duty to remove ; and I only wish to set right one of the most respectable, and indeed all those respectable characters who presided on the Bench upon that day. I shall, therefore, say no more upon that subject.

Gentlemen, the question is now before you ; and I

am happy to have the testimony of my Learned Friend, that, taking this proceeding as a mere proceeding of accusation, it is a highly proper one ; and when I state that, I mean to state merely the satisfaction I feel in the concurrence of his opinion with my own judgment.

Gentlemen, having said thus much, give me leave to concur most fully in all that my Learned Friend says, with respect to the beneficial effects of a lenient administration of the law, but not so lenient as to make the law ineffectual.

Gentlemen, it was hinted to me, before my Learned Friend began his address to you, that, with respect to two of the Defendants, it might be consistent with the interests of justice, that the trial should end there ; and why did I consent to that ? There was evidence to go to the Jury, as against Mr. Thompson ; I admit, not evidence to convict him, not evidence, perhaps, with respect to his identity—but with respect to Mr. Gunter Browne, there was much more considerable evidence to go to you, subject still to the question of identity. But I know this, that the great interests of public justice are better satisfied, by not pressing for conviction, even when you *can*, perhaps, obtain it, if you think there are doubts whether or not you *ought* to obtain it.

Gentlemen, another circumstance is, that I thought it due particularly to one Defendant, with respect to whom I think this the clearest case, Mr. O'Brien. I wished to give him the benefit of Mr. Browne's and Mr. Thompson's evidence, if he thought proper to call them, with respect to some material circumstances.

Gentlemen, attend to what I am now stating. When

Mr. Sheridan is asked, whether, from the circumstances that fell within his observation, he believes that Lord Thanet and Mr. Fergusson meant to favour the escape of Mr. O'Connor? he says: "From the facts that fell within my observation, I answer it in the negative." So I say in this case, it is not merely (for the rules of evidence permit one so to state), it is not merely from what *does* appear, that a Jury is to judge, but also from that which does *not* appear. Now see what is the case on the part of the Crown, with respect to Mr. O'Brien. In the first place, you have the evidence of a most honourable person, Mr. Sergeant Shepherd. My Learned Friend says, that you, Gentlemen of the Jury, are not to attend to general questions, such as, "Did a person appear to do so and so?" but you are to have the facts as the grounds upon which that appearance is inferred. That proposition is to be carried this length, that, as far as the nature of the transaction will admit, instead of giving the impression of your mind, as collected from the circumstances, you shall give the circumstances which have created that impression. I am sure his Lordship will remember, that in the case of Kyd Wake, who was tried for that detestable riot with respect to the King's person, a question was put, "Did he appear to be active in the riot?" and the Jury concluded that which they did conclude, upon that circumstance; recollecting that the nature of the transaction was such, that they must be content with such an answer. And indeed my Learned Friends themselves put the question to Mr. Smith, and Mr. Warren, respectable

witnesses unquestionably : “ Did they (the Defendants) “ appear to encourage the riots ? ” But permit me to say, it did not rest so with Mr. Serjeant Shepherd ; for he told you, he wished to give the evidence upon which he formed his opinion. Gentlemen, you will next observe, that giving Lord Thanet all the benefit that might arise upon this statute of 14 Geo. III. (upon which I shall say a word by and by), can Mr. O'Brien allege any thing of that kind ? Rivett has told you distinctly (and so it turns out from Mr. Sheridan's evidence), that there was a rumour of a warrant, which created so much indignation ; Mr. Sheridan admits, that there was that rumour, but Mr. O'Brien did not choose to rely upon that ; he wanted to know how the truth of the rumour was ; and, accordingly, in the presence of Mr. Thompson, a member of parliament, he did make inquiries of Rivett, and coming to him, as Rivett relates, he, Mr. O'Brien, proposed a bet ; he says, that Mr. O'Brien then went back again to where Mr. O'Connor was ; there was some conversation between them, and when the verdict is brought in Mr. O'Connor attempts to escape. Now, I ask you, as honest Jurymen, if this is not true, why is it not contradicted ; and if it is true, is it possible to acquit Mr. O'Brien ?

Now, with respect to the case of my Lord Thanet and the case of Mr. Fergusson, Gentlemen, I declare to you most solemnly, that I respect the high situation of the one, as I respect the professional situation of the other ; but in this case, Gentlemen, the question, and the only question is, “ Did they make a riot ? ” I de-

sire that the question may be put upon its true merits. My Learned Friend says, "It is a most extraordinary thing, that in such a case as this, stating that there was a general riot, we have not been able to fix the name of any other rioter than these five Defendants." Has my Learned Friend denied that this was a general riot? Has my Learned Friend denied that it was a very serious riot, affecting a great variety of persons? Now, though he is bound to admit the existence of a riot, my Learned Friend is just as much at a loss to find the names of the other persons as I am; and why? because the circumstances attending the transaction are such, that if you will not attend to the conduct of the few individuals who have been pointed out, it is not in the nature of things, that you should bring any man to punishment, in such a case. Then my Learned Friend says, "What motive could Lord Thanet have?" Mr. O'Connor, who has been represented as an extremely judicious man upon some occasions, was certainly so foolish, as to think such a project as this might have been practicable; but it is in fact imputed to these persons, that they meant to turn Mr. O'Connor loose, in order to subvert the constitution of this country? (for so my Learned Friend states it;) and to do all this mischief which he is pleased to represent to you, must have been the consequence of Mr. O'Connor's escape. He seems to have forgot, that all I meant to impute (for aught I know, there may be men in the country who know more of it than I do), that all I am charging these Defendants is, that they meant to rescue Mr. O'Connor from any further demand that Justice

might have upon him. Whether Mr. O'Connor was immediately to take himself out of this country, into a situation in which he could do no mischief, or whether he was to remain in this country to do mischief, is a question with which I have no business.—I have no necessity either to impute to the Noble Lord or the Learned Gentleman, any particular knowledge or intention upon that subject. Then my Learned Friend says, “Do you think persons in the situation in which “these two Defendants are (I mean Lord Thanet and “Mr. Fergusson), would further such a purpose as “this?” Why, Gentlemen, if I am to give an answer to this question, I am bound (for I would not have brought this prosecution, if I had not thought it a fit question for the decision of a Jury) to speak out plainly upon the subject; and I say, fairly, that if any man had asked me before this trial was over, whether Mr. Fergusson and Lord Thanet, having heard the particulars of the evidence, would not have removed to situations where they could not have been implicated in this charge, I should have thought the imprudence of doing otherwise so great, that it could not have happened. Mr. Fergusson knew all the particulars of the evidence, and so did Lord Thanet, because he heard the evidence summed up, and I cannot help feeling here some degree of surprise, when the question was put to me, upon what was probable or what was improbable, after hearing the evidence upon that trial.

Gentlemen, that there was a riot, is clear beyond all doubt. Now let us see how it is occasioned:—Mr. O'Brien knew of this rumour, at the time the appli-

cation was made to the Court, by Rivett and Fugion. He was aware, that Mr. O'Connor was not discharged. He learned, and Lord Thanet learned, and I believe nobody doubts the fact, that every body learned this circumstance, not only that he was not then to be discharged (with reference to which I am happy to find that my Learned Friend and I agree upon the point of law), not only that he was not then to be discharged, but it was publicly taught to every body in Court what was the reason and what the cause for which his discharge was to be withheld from him. And here, without commenting upon that measure, which is supposed to have raised so much indignation, I take leave to say most confidently, that it does not belong to any person, of any rank or situation whatever, to interpose in the execution of a warrant, upon his notion whether the magistrate has acted right or wrong in granting it.—It is granted, and must be acted upon.—If the magistrate has acted improperly, the law of the country is not so feeble, as not to be able to reach the misconduct of the magistrate. If every man is to judge in such a case, surely the country is in a situation most embarrassing, most difficult, and most awful (for, remember, if men will take the law into their own hands where there are verdicts of Acquittal, they may where there are verdicts of Guilty). Well, then, the parties having distinctly learned, that there was a warrant, and having been authoritatively told, that this warrant having issued, Mr. O'Connor was not to be discharged, I shall call your attention to what I take to be the few circumstances that must decide this case :—Gentlemen,

if you please I will put it so, not to give Rivett any credit, if, upon any other part of the case, he is contradicted; but I should do that with great reluctance, till I am satisfied that he is not worthy of credit. But I will say this, that you may reject the whole of the evidence of Rivett, with respect to Lord Thanet and Mr. Fergusson, out of the case, and say, whether out of the negative evidence given on the other side, you can get rid of the facts sworn and deposed to by persons whose characters are out of the reach of the breath of suspicion.

In the first place, with respect to the evidence of somebody, whose name I forget, upon the trial at Maidstone, a witness was asked, whether Mr. O'Connor wished to favour an invasion of Ireland? he said, Quite the contrary.—So here, a witness when he was asked, whether Mr. Fergusson appeared to be favourable to this rescue, he said, "Quite the contrary." This was a much stronger negation than that of the Maidstone witness; but upon being asked, what was the circumstance from which he inferred, that Mr. Fergusson's demeanour was quite the contrary? he says, he complained of the Bow Street Officers coming forward. Now, Mr. Fergusson must have known them to be Bow Street Officers, because he was present when they were examined; and being a gentleman that wears the robe that I wear, he could not but understand, that they were not to be disturbed, *because* they were Officers. The great proof of his demeanour then being quite the contrary, is, that he makes a complaint of these persons standing between the Prisoner and the Jury; whether the fact was so, or not, I do not know.

Mr. Garrow says, he apprehends, from the state of the Court, it could not be at that period of the trial. Then what is the answer to that? I will put it in plain intelligible words:—If Mr. Fergusson had been misled by reading the statute 14 Geo. III. which says, “that “Gaolers shall not detain prisoners for their fees, but that “they shall be discharged;” if he had not found out the difference between a verdict of Not Guilty, and that judgment which authorizes a man to go without paying his fees; if it had not occurred to him, that, when this discharge is given, detainers may be lodged in civil suits, or for other felonies, I hope in God we are not so revolutionized as to contend, that a man shall not be charged with two treasons, as well as with two felonies. Upon Mr. Fergusson being told, that there was this warrant (the warrant being publicly exhibited), it is not for me to examine, what it became Mr. Fergusson to do, because of that he is himself the judge. But I say, if, after he was apprized of that, he took any part, not by positive actual conduct, but by encouragement, capable of being exhibited to the understandings, and impressed upon the minds of the Jury, as such (however differently persons may tell their stories, with reference to certain facts, in which they do not agree, however strongly individuals may speak with respect to facts that they did not observe, however negatively they may say they did not see this or that, and they do not think it possible, and so forth); if there are positive circumstances sworn, which amount to acts of encouragement, which a Jury can feel and act upon, they must look to that positive evi-

dence ; and if in this case, Gentlemen, you find that positive evidence existing, however unwilling you may be to find such a verdict, you are sworn, upon your oaths, to give a verdict according to law ; and you must find a verdict, therefore, in support of this Information.

Gentlemen, I will not go into a detail of the evidence, which you will hear from his Lordship ; but with reference to Lord Thanet and Mr. Fergusson, I cannot part with the evidence given by Mr. Solicitor General ; but I shall first make this observation upon the evidence of Mr. Serjeant Shepherd, to whose credit, honour, and accuracy, we all do justice, that where that evidence presses upon Mr. O'Brien, he says, that " Mr. O'Brien having turned round and looked " up at Mr. O'Connor, it made an impression upon " his mind : " and also that, " as far as he observed, " Lord Thanet was defending himself." He judges, therefore, of appearances, both with reference to Lord Thanet and with reference to Mr. O'Brien ; and what he says of the appearances with reference to Mr. O'Brien certainly throws a great degree of credit upon his accuracy when he speaks with respect to Lord Thanet. The same credit is due, I take it, to Mr. Solicitor General ; and you will have the goodness also to attend to the evidence of Mr. Hussey ; for if you believe what he states, that when the man was pressing forward to execute the warrant, Lord Thanet inclined towards the Bar, and put his person in the way ; if that fact is proved to your satisfaction, Lord Thanet is guilty upon this record. And if other facts are proved against Lord Thanet, and similar facts are

proved against Mr. Fergusson, you must decide upon all the evidence, and not from what other men did *not* see or observe; you are not to decide upon the eloquence of my Learned Friend, but upon the oaths of persons who depose positively to facts. Then my Learned Friend made an observation upon the evidence of Mr. Solicitor General, with reference to whom, as a moral character, I say nothing, because he is above all praise that I can bestow upon him; I have no doubt that it was an extremely painful thing for him to give his evidence this day; but his evidence is extremely material, because he speaks to the circumstance of Mr. Fergusson crying out that Mr. O'Connor was discharged. He tells you the pains he took with his brother in the profession to tell him that he was not discharged; and he speaks to the warrant being produced, and, therefore, there was a public notice, that there were further demands of justice upon Mr O'Connor. He states upon his oath, that he did most distinctly and cautiously attend to the conduct of Mr. Fergusson and Mr. O'Connor; and then he says this; "I fixed my eye upon O'Connor, and I observed Mr. Fergusson, and other persons whom I did not know, encouraging Mr. O'Connor to go over the Bar." Encouraging is a general word undoubtedly; but it is a word which expresses the impression which facts falling under his eye had made upon his mind; and when he was asked what he meant by encouragement? he describes it to have been by his actions. But he not only gives his evidence in this way as to that particular fact, but he gives it also with a caution, which

entitles it to the same degree of credit which Mr. Serjeant Shepherd's evidence derives from its accuracy ; for when he comes to speak of a circumstance, with reference to which he is not certain, he tells you, " Mr. O'Connor jumped over the Bar, and Mr. Fergusson " turned himself round and appeared to me to follow " Mr. O'Connor ; but I cannot say that he did." He qualifies that apprehension in his mind, by telling you that he may be mistaken, and then he gives you the reason why he doubts whether that apprehension was or was not justly founded ; and he finally states in his evidence a circumstance respecting Lord Thanet, which I think will deserve a great deal of your consideration. Gentlemen, a Learned Friend of mine behind me, Mr. Abbott, has told you, that he heard Lord Thanet express himself in the manner which he has described, and I trust I shall not be told that the manner of an expression is not evidence of the import of the mind of the man from whose mouth the expression flows. He states to you the circumstance of Mr. Sheridan's conversation with the Learned Judge, and he was struck with the extreme difference of the manner in which Mr. Sheridan expressed himself to that Learned Judge, from the manner in which Lord Thanet expressed himself. Am I to be surprised that Lord Thanet could be engaged in such a project, if I can believe, that he, a Peer of the realm, made use of such language to a Judge of the country, that " he thought " it fair that he, the Prisoner, should have a run for " it ?"—a run, for what ? why, a run to elude justice ! —a run to get out of the hands of a court of justice

—a run to prevent being brought to justice ; and this is the sentiment of a Peer of the realm—“ he thought it “ fair to have a run for it.” And, considering it to be fair, he acted upon that apprehension, as far as he had the power of acting. This is a circumstance requiring your anxious consideration. Whether this Noble Peer struck Rivett first, which I do not find Rivett say that he did, is of no importance. These men have a certain temper and degree of spirit about them, which might, perhaps, induce them to thrash a Peer more than any body else, if they felt themselves ill-treated ; but Mr. Rivett may take this advice of me—I hope, in future, he will not use such treatment if he can avoid it. But what presses upon my mind is, that if Lord Thanet, treated in the manner he was by Rivett, had no connexion with this project of rescue ; if he had not, either from the circumstances that fell under Mr. Sheridan’s observation, or from other circumstances, manifested that he meant there should be a rescue, is it the conduct of a man of considerable situation—is it the conduct of a man of common sense, instead of making a serious complaint upon the subject, instead of stating, as he naturally would have done, “ this project of rescuing “ a man from the hands of justice, is that species of “ project, which, in my situation, it must be known “ I must feel to be inconsistent with propriety, duty, “ and honour to have embarked in ?” On the contrary, he is perfectly neutral ; no complaint is made upon the subject. It appears to me, that if I had been struck two or three times by that Officer, the manner in which I would have acted upon that occasion would certainly

not have been to have immediately stated that "it was fair the Prisoner should have a run for it," but to have made some application to have those punished of whose conduct I had a right to complain. Now, this evidence of the Solicitor General is also confirmed by Mr. Abbott, and by Mr. Serjeant Shepherd, who states to you what Lord Thanet did ; and he states it to you, that he was not holding up his hands for the purpose of rescuing himself from the pressure of the mob ; but was holding up his hands to defend himself against those persons who were pursuing Mr. O'Connor ; and he gives his evidence in such a way, that you can have no doubt as to the personal conduct of Lord Thanet. Then when you have heard this evidence on the part of the prosecution, I mean the evidence that goes to positive facts, it will be for you to decide whether they are not all reconcilable with the negative evidence given on the part of the Defendants. I have not gone into the whole of the evidence, because I feel that my Lord has a painful and an anxious duty to perform, and whatever your verdict may be, I am confident and sure that this prosecution will have been very beneficial to the country. I hope and trust that I shall never see such another ; but whenever I see an occasion which calls for it, whilst I hold the situation which I have the honour to fill, I will not fail to institute it.

Gentlemen, having said thus much, and having endeavoured to discharge myself of my duty, you will be good enough to say what is due as between the Public and the Defendants.

LORD KENYON'S CHARGE TO THE JURY.

GENTLEMEN OF THE JURY,

IF, consistently with my own sense of my duty, or consistently with the public expectations—consistently with the expectations of the Bar on the one side and the other, and with your expectations—I could relieve myself from going through, in detail, all the particulars of this case, after considerable bodily and mental exertions already, I should certainly save myself from a great deal of trouble. But I will not shrink from the discharge of my duty, though it may be attended with labour and pain.

This is a case of the first importance. I do not remember any case that ever happened in my time, in the shape of a misdemeanor, of more importance to the Public; and it has been conducted in the most solemn manner. It is brought before the whole Court, assisted by a Jury of Gentlemen from the county of Kent, taken from the highest orders of the people, and whose educations and stations in the world qualify them to decide causes of such importance. It is usual, in causes of this kind, where there is a number of Defendants, and where the evidence does not extend sufficiently to them all, to submit to the Jury, before the end of the cause, whether those upon whom the evidence does not attach, ought not to be acquitted, in order that the other Defendants may avail themselves of their evidence, if they shall think proper. It was with a view to that very state of the question that I

took the liberty to submit to you, that two of the Defendants ought to be acquitted before the other Defendants produced their evidence; and I did it with a view that the others might, if they thought fit, appeal to their evidence, to show, on the rest of the case, what the real state and justice of it was.

In dispensing the criminal justice of the country, we have sometimes an arduous task to perform. It is not a pleasant thing, most certainly, to condemn any one of our fellow-creatures to punishment: but those who are entrusted with the administration of the criminal justice of a country, must summon up their fortitude, and render justice to the Public, as well as justice tempered with mercy to the individual. I have the authority of Lord Hale, one of the greatest and best men that ever lived, for saying, that Juries are not to overlook the evidence—that they are not to forget the truth, and to give way to false mercy; but without looking to the right hand or the left, they are to weigh the evidence on both sides, and then, according to the best of their judgment and understanding, to do justice to the Public, as well as to the Defendants.

Before I proceed to sum up the evidence, I shall only make one other observation, which was made by Mr. Whitbread in giving his evidence, the tone of whose voice I never heard before. Having gone through his evidence, he gave us this *legacy*, as a clue to direct us in the decision of this case—"that, in a
 " scene of so much confusion, there are many things
 " which must escape the observation of every indivi-
 " dual." Having stated thus much to you, I will

now proceed to sum up the evidence; and when I have done that, I shall make some few observations on it. [*His Lordship here summed up the evidence on both sides, and then proceeded as follows:*]

I now proceed to make a few observations of my own. There is no occasion to give you my authority, or the authority of those who hear me, upon this point. There is no doubt that the Prisoner was not entitled to be discharged; for, when a verdict of acquittal is entered, a Judge may order a party to be detained, and compel him to answer other charges that may have been brought against him. On this point there is no difference of opinion; it is not even disputed at the Bar; the case is clear; and there is no doubt upon earth that a Prisoner, in many cases, though he may be acquitted, as in the case of an appeal of murder, cannot be discharged though he be acquitted of the murder.

I have stated the evidence on the one side and the other; and although there is strong contradictory evidence, yet I think there is a great deal of evidence which goes in support of the charge. There were some observations made by the Learned Counsel for the Defendants, which, perhaps, were not altogether warranted. Counsel are frequently induced, and they are justified in taking the most favourable view of their Clients' case; and it is not unfair to pass over any piece of evidence they find difficult to deal with, provided they cite, fairly and correctly, those parts of the evidence they comment upon. The Learned Counsel for the Defendants, in his remarks on the evidence, totally forgot the evidence of Mr. Parker. If his evi-

dence is to be believed, and I know no reason why it is not, he certainly gave important evidence in support of this charge—that the Defendants evidently appeared to be attempting to stop the Officers, and assisting the escape of Mr. O'Connor. The Learned Counsel for the Defendants did not choose to deal with this evidence, though he conducted the cause with all possible discretion, abilities, and eloquence. As I have before observed, there is apparently a great deal of contradiction in this cause. I must again state the observation of Mr. Whitbread, and which was obvious if he had not made it, that, “in such a scene of tumult and confusion, many things must pass which escape the observation of every individual.” But there is no doubt of one thing—one thing is clear: if Rivett had not the scuffle which he swears he had with Mr. Fergusson and my Lord Thanet, and if he did not wrench a stick out of Mr. Fergusson's hand, he is palpably forsworn, and grossly perjured. For him there is no excuse in the world. What motive he might have, I do not know: he has no interest; and in weighing the testimony of witnesses, I cannot consider the rank of a person, nor his station. It is clear, if he has not told the truth, he is guilty of perjury. In this scene of tumult, men's minds must have been greatly distracted. It is for you to say what degree of credit you will give to all the witnesses. These are the observations I have to make; and I should retire from my duty if I had not made them to you.

It has been said, in the course of this cause, that it was against all probability. Was it probable that an

attempt was meditated to effect the escape of a person such as Mr. O'Connor, in a Court of Justice, in a large town, and in a public part of that town? Was it probable that this man himself should attempt that, which, Mr. Sheridan said, appeared to him to be an act of madness? Is it most likely that he should have attempted this with hopes of success, with or without assistance? This is matter for your consideration. It is very likely you have forestalled all the observations I have made; but still it was not less my duty to make them. The whole of this case is for your decision. It is a case in which the interests of the individuals, as well as of the public, are highly embarked.

At eleven o'clock at night the Jury retired; and after being out about an hour, they returned with the following verdict:—

THE EARL OF THANET,	} <i>Guilty.</i>
ROBERT FERGUSON, ESQ.	
DENNIS O'BRIEN, ESQ. <i>Not Guilty.</i>	

The Reader being now possessed of the arguments of the Counsel, the whole of the evidence, and the sentiments of the Court upon both, the Editor refrains from any observations of his own upon the verdict; but he feels that he owes it to the Earl of Thanet and Mr. Fergusson to add what was said by themselves in

their own exculpation when brought up to receive judgment; and, above all, their solemn oaths in support of their innocence. It was certainly a great indulgence in the Court to suffer their affidavits to be recorded, because, strictly speaking, affidavits that cannot, by the practice of the Court, be received by the Judges in mitigation of punishment, as opposing the truth of the verdict, cannot be permitted to be filed. This was, however, permitted upon the present occasion.

On Friday, the 3rd of May, Mr. Attorney General prayed the judgment of the Court.

Lord Kenyon—(to Mr. Erskine).—Have you any thing to say for the two persons convicted?

Mr. Erskine. The cause having been tried at Bar, your Lordships are already apprized of every thing I could have to offer. I believe Lord Thanet and Mr. Fergusson wish to say something to your Lordships.

LORD THANET.

My Lords, before the sentence is pronounced, I beg leave to address a few words to the Court:—not for the purpose of impeaching the veracity of the witnesses for the prosecution, or of arraiguing the propriety of the verdict: on those points I shall say nothing. What I mean to submit to the Court is, a short, dis-

tinct narrative of the facts, as far as I was concerned in them.

I attended the trial at Maidstone in consequence of a subpoena. When I had given my evidence, I retired from the Court, without any intention of returning until I was particularly requested to be present at the defence made by Mr. Dallas, the Prisoner's Counsel. At that time I had never heard of the existence of a warrant against Mr. O'Connor, nor of any design to secure his person if he should be acquitted. The place I sat in was that which Mr. Dallas had quitted, when he removed to one more convenient for addressing the Jury. While sitting there, I heard, for the first time, from Mr. Plummer, that he had reason to believe there was a warrant to detain Mr. O'Connor. When the verdict was pronounced, I went into the Solicitors' box, to shake hands with Mr. O'Connor, which I did without even speaking to him. Many others pressed forwards, apparently for the same purpose. Upon a call for silence and order from the Bench, or from one of the Officers of the Court, I immediately sat down on the seat under that part of the Dock where Mr. O'Connor stood. At that period some confusion arose, from several persons attempting to get towards him, one of whom said he had a warrant to apprehend him, for which he appeared to me to be reprimanded by Mr. Justice Buller, in some few words, which I did not distinctly hear. The moment the Judge had passed sentence on O'Coigly, a most violent pushing began from the farther end of the seat on which I sat. From the situation I was in, I did not perceive that Mr.

O'Connor was attempting to escape. He was a good deal above me, and I sat with my back to him. I continued sitting in my place, until several persons on the same seat were struck, among whom, I imagine Mr. Gunter Browne was one, from the complaint he afterwards made of ill-treatment, but whom I never saw before or since to my knowledge. I then began to feel the danger I was in; but the tumult increased about me so rapidly, that I was unable to get over the railing before me. I stood up, however, and used all the efforts in my power to go towards the Judges, as to a place of safety; but at that moment, by some person or other, I was borne down on the table, where a man (I afterwards found was Rivett) struck at me several times with a stick, which I warded off, as well as I was able, with a small walking-stick. Rivett, as he struck me, charged me with striking him first, which I denied, and called out to him, as loud as I could, that I had not struck him.

I have now detailed, as clearly as I am able, my situation and conduct, during the disturbance; and I do most solemnly declare on my word of honour, which I have been always taught to consider equally sacred with the obligation of an oath, and am ready to confirm by my oath if I am permitted to do so, that I never did any one act but what was strictly in defence of my person. It is not at all unlikely, that, in such a scene of confusion, I might have pushed others, who pressed against me, to save myself from being thrown down; but I most solemnly deny that I lifted my hand or stick offensively, or used any kind of violence to any

person. I declare upon my word of honour, that I knew nothing of the existence of a warrant to detain Mr. O'Connor, until I heard it from Mr. Plummer; and that, even then, it never entered into my mind that it was to be served upon him in the Court, until some person called out that he had a warrant. I declare upon my word of honour, that the obstruction which the Officers met with on the seat where I sat, was perfectly unintentional on my part, and was solely owing to the situation I was in:—that I did nothing offensively, but, on the contrary, was violently attacked and assaulted; and that I retired from the scene of confusion as soon as I was able. And, finally, I do most solemnly declare upon my word of honour, that I did not concert with any person the rescue of Mr. O'Connor, by violence, or by any other means whatsoever; that I had no idea of doing it alone; and that I was not privy to any consultation of other persons, either for the purpose of rescuing Mr. O'Connor out of the custody of the Court, or of preventing the execution of the warrant.

As I hold myself bound to state fairly, not only what I did, but what I said, as far as it is in my power to recollect what passed, with the agitation of such a tumult on my mind, I acknowledge that some words may have escaped me, which I ought not to have spoken. I am charged with having said, that I thought “it fair that he should have a run for it.” I will not dispute about the exact words. I confess they were extremely inconsiderate. Some allowance, however, I think, may be made for the instant feelings of a man so ill-treated as I had been.

My Lords, I am not sanguine enough to expect any immediate advantage from these declarations. I know they will not avail me against the verdict: but the truth of them will not be suspected by those who know me; and hereafter, when all the circumstances of this transaction shall be coolly reconsidered, I am confident they will have weight with the Public.

My Lord, I have an affidavit prepared, if your Lordship will accept of it.

Lord Kenyon. To the same effect?

Lord Thanet. Yes, my Lord.

Lord Kenyon. We cannot here receive an affidavit, against the verdict of a Jury: but I believe it may be ordered to be filed; I believe there is no objection to that.

Mr. Erskine. I believe there is not, my Lord.

It was ordered to be filed.

AFFIDAVIT.

The Defendant, the Earl of Thanet, maketh oath, and saith, that he attended at the Special Commission held at Maidstone, in the county of Kent, for the trial of Arthur O'Connor, Esq. and others, for high treason, in consequence of a subpœna served upon him, to give evidence on behalf of the said Arthur O'Connor, and which was the sole cause of his attending at the said trial; and he saith, that after he had given his evidence, he retired from the Court, and had no intention of returning thereto, till he was particularly pressed to be present to hear the defence of the Counsel for the Prisoners, merely as a matter of attention and counte-

nance to the said Arthur O'Connor, who was his acquaintance; and he further saith, that at that time he had no knowledge whatever of the existence of any warrant against the said Arthur O'Connor, nor of any intention of securing his person if he should be acquitted on the Indictment. And this Deponent further saith, that he sat in the place which Mr. Dallas had left, when he went to a more convenient one for the purpose of addressing the Jury; and that, whilst he was sitting there, he for the first time heard from Mr. Plummer, that he had reason to believe there was a warrant to detain Mr. O'Connor; and this Deponent further saith, that on the verdict's being pronounced, he stept into the Solicitors' seat to shake hands with Mr. O'Connor, which he did without even speaking to him, and without any other motive than that of congratulating him as a friend on his acquittal, at which time many others were coming to the same place where this Deponent was; that upon a call for order and silence from the Bench, or from one of the Officers of the Court, he immediately sat down on the seat under that part of the Dock where Mr. O'Connor stood, and at that period a slight confusion arose from several persons attempting to get towards Mr. O'Connor, one of whom said he had a warrant to apprehend him, for which he appeared to be reprimanded by the Honourable Sir Francis Buller, in a few words which this Deponent did not distinctly hear. And this Deponent further saith, that at the moment the Judge had passed sentence of death on O'Coigly, the most violent pushing began on the seat on which he sat (this Deponent

not observing, that Mr. O'Connor was attempting to get away), and he continued sitting in his place till several persons on the same seat were struck, and amongst whom he believes was Mr. Gunter Browne, whom he never before, or since, had seen to his knowledge; and from that moment, this Deponent began to feel the danger he was in, the tumult about him increasing so rapidly, that he was unable to get over the railing before him; that, however, he stood up, and used all the efforts in his power to go towards the Judges as a place of safety; but he was instantly pushed down on the table, when a man, whom he has since found was John Rivett, struck at him several times with a stick, which blows he warded off as well as he was able with a small walking-stick, the said Rivett charging this Deponent, as he struck at him, with striking him first, which this Deponent denied, calling out at the same time as loud as he could, that he had not struck him. And this Deponent further saith, that he never did, during the said disturbance, any one act, but what was strictly in the defence of his person, though he admits that he might have pushed several persons that pushed against him, to prevent his being thrown down, but that he did not lift hand or stick, or use any violence whatsoever, to the said John Rivett, or any other person. And this Deponent positively saith, that he was not privy to, or acquainted with, the existence of any warrant to detain the said Arthur O'Connor, until he heard of such warrant from Mr. Plummer, as before set forth; and that it never entered into his mind that it was to be served upon him in

Court, until the person before mentioned called out that he had a warrant. And this Deponent further saith, that the obstruction the Officer met with on the seat on which this Deponent sat, was perfectly unintentional on his part, and solely owing to the unfortunate situation in which he had accidentally placed himself, as the seat was so narrow that it was with great difficulty any person could pass that way. And this Deponent further saith, that he did nothing with intention to offend the Court, or any other person; but, on the contrary, he was violently attacked and assaulted; and that he retired from the scene of confusion as soon as he was able. And this Deponent further saith, that he doth most solemnly upon his oath declare, that he had not consulted, concerted, or advised with any other person or persons whomsoever, to favour the escape of the said Arthur O'Connor, either by violence, or any other means whatsoever; and that he had no idea of doing it alone; and that he was not privy to the consultation or agreement of any other person or persons, either for the purpose of rescuing the said Arthur O'Connor out of the custody he then was in, or preventing the execution of any other warrant upon him.

THANET.

Sworn in Court the 3d of May 1799.

By the Court.

MR. FERGUSSON.

My Lords, I have nothing to offer to your Lordships, either with respect to the charge itself, the manner in which it was proved, or with respect to my own peculiar situation upon which your Lordships' judgment, whatever it may be, must make a deep and lasting impression. I cannot so soon have forgotten the manner in which these topics were urged in your Lordship's presence, in the course of that defence which was made for me by the most zealous of friends, the most able and eloquent of men.

I gladly, however, avail myself of the privilege of addressing your Lordships, because it enables me thus publicly to say, that, whatever be the political opinions which some may choose to ascribe to me,—whatever be those which I do in fact entertain,—opinions which I believe to be strictly consonant to the best principles of the law and constitution of my country :—but whatever be those opinions,—whatever, even, my Lord, be the appearances against me, standing where I now do,—still I can with truth and sincerity declare, that there is no man who hears me, who is more deeply impressed with a sense of the respect which is due to the administration of justice, of the strict obedience which should be paid to the proceedings of its Courts, and of the honour and reverence which should ever attend the persons of its Judges. Weak, indeed, must be the opinions, or wicked must be the views, of that man who wishes to degrade the authority of the law ; for with-

out it, not one of the blessings of society can have security for one moment. My Lords, I can safely acquit myself of this part of the charge, because my reason, as well as my conscience, tells me, it is the last offence I am capable of committing.

I appear, however, before your Lordships, to receive that judgment which your duty calls upon you to pronounce, in consequence of the verdict of a Jury. That verdict I do not mean to arraign: it was given on contradictory evidence, the value and balance of which it was the peculiar province of the Jury to weigh and to decide.

But if your Lordships' long practice in Courts of Justice shall have shown you the fallibility of human testimony,—if it shall have shown you, still more, the fallibility of human judgment founded upon human testimony, I hope I may meet with your indulgence, if I here make a solemn declaration of that, with respect to which I alone *cannot* be mistaken.

My Lords, upon the occasion which has given rise to these proceedings, I was of Counsel for one of the Prisoners who was tried at Maidstone. I was seated in the place which was allotted for the Counsel for the Prisoners; and being wholly engaged in the discharge of my duty, I solemnly aver, that whatever might be the previous consultations or conversations of others, with respect to the practicability or impracticability of a rescue, I never had even heard the rumour that a fresh warrant was in existence, until after the Jury had retired to consider of their verdict. It was not till after they had so retired, and very shortly before they

returned into Court, that I learned that circumstance. I was in my place, seated where I had been during the greater part of the day, at the moment the verdict was delivered: and I do most solemnly aver, that from that moment until I was pressed upon by the crowd, I did not stir from that seat. I do further declare, that when I was forced upon the table, I used no violence to any one; that the whole of my endeavours went to allay the ferment, and to remove those of my friends whom I loved and regarded, from the scene of disturbance, in order that they might not be implicated in any charge that might afterwards be brought against those who were the authors of it.

I can, therefore, say, in the presence of this Court, and under the eyes of my countrymen—that which, in the name of my God, I have already sworn—that I am innocent of this charge.

Here Mr. Fergusson put in an Affidavit, which he had previously sworn.

AFFIDAVIT.

Robert Fergusson, of Lincoln's Inn, Esquire, one of the said Defendants, maketh oath, and saith, that he was of Counsel assigned by the Court for John Allen, one of the Prisoners indicted with Arthur O'Connor, for high treason, at a Special Session held at Maidstone, in May last, and that as such Counsel he was employed in Court during the whole of the day, in the night of which the riot charged in the Information took place; he saith, that he neither knew, or had heard,

of any fresh warrant against the said Arthur O'Connor, until the Jury had gone to consider of their verdict, and very shortly before they returned to deliver it. And this Deponent further saith, that he was in the place allotted to him as Counsel, when the Jury returned into Court with their verdict; and that about that time, he complained to the Court of the interruption which was given to its proceedings by the violence of a person who was pressing forward between the Prisoners and the Court: and that upon the complaint of this Deponent, Mr. Justice Buller ordered the said person to be quiet. And this Deponent further saith, that from the time when the Jury returned with their verdict, until after sentence was pronounced, and the disturbance began, the said Deponent remained in his place as Counsel, and did not leave it until compelled by the violence of those who pressed upon him from the bench behind.* And this Deponent further saith, that when forced upon the table, he used no violence to any one, but used every means in his power to allay the ferment, and save the Earl of Thanet from the blows of John Rivett, without offering any violence to the said John Rivett. And this Deponent further saith, that he had not, during any part of the disturbance, any stick, sword, or other weapon in his hand, and that he did not use, or offer, violence to any one. And this Deponent further saith, that he neither attempted to rescue the said Arthur O'Connor, nor did he at any time agree with others to attempt such rescue, nor was he in any way aiding or assisting, nor

did he at any time agree with others to aid or assist the said Arthur O'Connor in any attempt to be made by him to escape.

ROBERT FERGUSSON.

Sworn in Court the 3d day of May 1799.

By the Court.

On the 1st of June, the Court gave judgment :—

The Earl of Thanet was fined a thousand pounds, and imprisoned for a year in the Tower.

Mr. Fergusson an hundred pounds, and imprisoned for the same period in the King's Bench prison.

PROCEEDINGS
OF THE
FRIENDS TO THE LIBERTY OF THE PRESS.

Perhaps no period in the history of our country ever gave rise to a more distinct division of opinion as to the true policy of her state and government, than was occasioned by the phenomenon of the French revolution in its earlier stages, when the following Declaration of the Friends of the Liberty of the Press was delivered and published. By many honest and enlightened persons, independently of the extensive influence of power and patronage, the late Mr. Pitt was considered as the pilot who had weathered its storm; who, by raising a just and critical alarm against French principles, had, in a manner, enlisted the whole people of Great Britain in defence of her established constitution, and who, by a timely and vigorous domestic policy, had disarmed republican sedition through the terrors of criminal justice. By others not less enlightened, this severe system of domestic discipline, and, above all, the enactment of new and unprecedented laws to enforce it, was condemned, as not only unnecessary, but destructive of the object sought to be attained by it. They considered the supposed alarming fascination of French principles to have been employed only as a pretext for beating down, by force and terror, the efforts of those who sought only a constitutional reform in the representation of the House of Commons, and who sought it, as the safest antidote to republican principles, and the surest deliverance from the crisis of a revolution. They foretold that this unprincipled attempt (as they at least con-

sidered it) to subdue the human mind in a free country, by penal proceedings, beyond the temper and spirit of our ancient laws; above all, when such a course was directed against the Press, and pursued under the sanction of the very House of Commons, the desired reformation of which was the grand feature of all the state indictments against the people, would only bring round the evil (if an evil it was) in a more formidable and unmanageable shape, until the House of Commons, for the support of its own dignity, and the safety of its authority, of itself reformed the very abuses which many were punished for intemperately pointing out as fit subjects of reformation. Which of these two opposite opinions was the soundest and best, the Editor disclaims altogether the province of deciding; and he, therefore, refers the Reader to the exordium of the Speech for Mr. John Horne Tooke, from page 178 to page 184, in the third volume; and also to the following extract from the work of Mr. Erskine on the Causes and Consequences of the War with France, which he published in 1797, in which will be found, from page 11 to page 17, his opinion of the causes for issuing the King's Proclamation of the 21st of May 1792, and of the real state of the public mind at that momentous period. Whether he was justified in those opinions, or in his consequent conduct, every Reader, as throughout the whole of this Publication, is left wholly at liberty to judge for himself.

Extract from a Pamphlet entitled, A View of the Causes and Consequences of the War with France.

“For this purpose of alarm, the honest but irregular zeal of some societies, instituted for the reform of Parliament, furnished a seasonable, but a contemptible pretext; they had sent congratulations to the

French government when it had ceased to be monarchical: in their correspondences through the country, on the abuses and corruptions of the British Constitution, they had unfortunately mixed many ill-timed and extravagant encomiums upon the revolution of France, whilst its practice, for the time, had broke loose from the principles which deserve them; and, in their just indignation towards the confederacies then forming in Europe, they wrote many severe strictures against their monarchical establishments from which the mixed principles of our own government were not distinctly or prudently separated. They wrote besides, as an incitement to the reform of Parliament, many bitter observations upon the defective constitution, and the consequent corruptions of the House of Commons; some of which, according to the just theory of the law, were unquestionably libels.

“These irregularities and excesses were, for a considerable length of time, wholly overlooked by Government. Mr. Paine’s works had been extensively and industriously circulated throughout England and Scotland; the correspondences, which above a year afterwards became the subject of the state trials, had been printed in every newspaper, and sold without question or interruption in every shop in the kingdom; when a circumstance took place, not calculated, one would imagine, to have occasioned any additional alarm to the country, but which (mixed with the effects on the public from Mr. Burke’s first celebrated publication on the French Revolution)

seems to have given rise to the King's Proclamation, the first act of Government regarding France and her affairs.

"A few gentlemen, not above fifty in number, and consisting principally of persons of rank, talents, and character, formed themselves into a society, under the name of the Friends of the People. They had observed with concern, as they professed in the published motives of their association, the grossly unequal representation of the people in the House of Commons; its effects upon the measures of Government; but, above all, its apparent tendency to lower the dignity of Parliament, and to deprive it of the opinion of the people. Their avowed object was, therefore, to bring the very cause, which Mr. Pitt had so recently taken the lead in, fairly and respectfully before the House of Commons; in hopes, as they declared, to tranquillize the agitated part of the public, to restore affection and respect for the legislature, so necessary to secure submission to its authority; and by concentrating the views of all reformers to the preservation of our invaluable constitution, to prevent that fermentation of political opinion, which the French Revolution had undoubtedly given rise to, from taking a republican direction in Great Britain.* These were not only the professed objects of this association, but the truth and good faith of them received afterwards the sanction of judicial authority,

* I declare, upon my honour, these were my reasons for becoming a member of that society.

when their proceedings were brought forward by Government in the course of the state trials.

“ Nevertheless, on the very day that Mr. Grey,* at the desire of this small society, gave notice of his intended motion in the House of Commons, there was an instantaneous movement amongst Ministers, as if a great national conspiracy had been discovered. No act of Government appeared to have been in agitation before that period, although the correspondences before alluded to had, for months, been public and notorious, and there was scarcely an information, even for a libel, upon the file of the Court of King’s Bench. Nevertheless, a council was almost immediately held, and His Majesty was advised to issue his royal Proclamation of the 21st of May 1792, to rouse the vigilance and attention of the magistrates throughout the kingdom to the vigorous discharge of their duties.

“ If this had been the only object of the Proclamation, and if it had been followed up by no other proceedings than the suppression of libels, and a coercive respect for the authorities of Parliament, it would have been happy for England; unfortunately it seemed to have other objects, which, if as a subject of the country I have no right to condemn, I may at least, with the freedom of history, be now allowed to lament.

“ The Proclamation had unquestionably for its ob-

* Now Earl Grey.

ject to spread the alarm against French principles ; and, to do it effectually, all principles were considered as French by His Majesty's Ministers which questioned the infallibility of their own government, or which looked towards the least change in the representation of the people in Parliament.

“ If it had issued, however, under the authority of the British ministry only, it probably could not have produced its important and unfortunate effects. But the Minister, before he advised the measure, had taken care to secure the disunion of the Whig party, which had hitherto firmly and uniformly opposed both the principles and practice of his administration. To this body I gloried to belong, as I still do to cling even to the weather-beaten pieces of the wreck which remains of it. Neither am I ashamed of the appellation of party, when the phrase is properly understood ; for without parties, cemented by the union of sound principles, evil men and evil principles cannot be successfully resisted. I flatter myself that the people of England will not hastily believe, that I have ever been actuated in my public conduct by interest or ambition.

“ The Whig party, as it has been called, was insignificant indeed from its numbers, and weak from the formidable influence of the Crown in the hands of its adversaries ; but formidable, nevertheless, from illustrious rank, great property, and splendid talents ; still more from an opinion of public integrity, which formed a strong hold upon the minds of the country. I look

back with the most heartless and dispiriting sorrow to the division of this little phalanx, whose union upon the principles which first bound them together might, in spite of differences of opinion in matters concerning which good men may fairly differ, have preserved the peace of the world, re-animated the forms of our own Constitution, and averted calamities, the end of which I tremble to think of. Reflecting, however, as I do, upon the frailties of human nature, advertng to the deceptions which may be practised upon it, and which men, by insensible degrees, unconsciously may practise upon themselves ; compelled by candour to keep in view the unexampled crisis of the French Revolution, the horrors which disfigured it, the alarms inseparable from it, but, above all, the dexterous artifices which it furnished to inflame and to mislead ; I wish to draw a veil over the stages which divided statesmen and friends, at the very moment of all others when they ought to have drawn closer together, and when their union might have preserved their country. I shall, therefore, content myself with observing, that before the King's Proclamation was issued, the support of the Duke of Portland had not only probably been secured to it, but the assent of some of the most distinguished persons in the opposition had been well understood to the whole of that system of measures which ended in the war with France.

“The Proclamation thus supported, was planted as the only genuine banner of loyalty throughout the kingdom ; *voluntary bodies, to strengthen the executive power by maintaining prosecutions, were every where*

instituted. Society was rent asunder, and the harmony and freedom of the English manners were, for a season, totally destroyed."

IF, at the period in question, the Press had been visited by no other danger than the legal effects of the King's royal Proclamation, the following proceedings could certainly never have been promoted by men who understood and respected the Constitution. It is His Majesty's undoubted prerogative to superintend the whole executive magistracy, and to inculcate and command, when he sees fit, the utmost vigilance and exertion in the discharge of its various duties. The danger to the Press was of a very different kind.—VOLUNTARY SOCIETIES were formed in London, and were spreading, by the contagion of example, into the remotest parts of the kingdom. At the head of them all was the Society for the Protection of Liberty and Property, against Republicans and Levellers, instituted, we have no doubt, or at least supported, by well-intentioned persons, zealous to support the government, and giving credit for the occasion to the Ministers of the Crown; but how soon it assumed a most dangerous partnership with the executive power, utterly repugnant to every principle of the British government, and destructive of the happiness and security of the people, may be judged of by the following letter, from one of its worthiest members, addressed to the Chairman of the Association. This letter, which, being printed and publicly circulated, brought to day the extraordinary proceedings detailed in it, led almost immediately afterwards to the public meetings of the Friends of the Liberty of the Press, at the second of which, Mr. Erskine delivered what was afterwards adopted unanimously as a public Declaration to be printed and circulated throughout the kingdom. That Mr.

Thomas Law, * the author of the letter, was a member of the Society, reflects honour upon the Institution; that he declined some of the duties which it cast upon him, reflects honour upon himself.

A Letter to Mr. REEVES, Chairman of the Association for Preserving Liberty and Property, By THOMAS LAW, Esq. one of the Committee of that Society.

“GENTLEMEN,

“I feel it incumbent upon me to assign to you the reasons which have influenced me to absent myself from the sub-committee of correspondence; and in explanation of my conduct, I shall briefly recapitulate my motives for first uniting with your Association, as well as my proceedings as a member of the enlarged committee.

“I had just obtained *security of property* to the natives of Bengal, Bahar, and Benares, by a fixation of land-tax, and an abolition of all internal impositions, or, to use the words of authority, “A new constitution had been announced to many millions of the Asiatic subjects of Great Britain;” and I was rejoicing in this happy issue of my exertions, when I perused your advertisement, wherein you avowed yourselves to be ‘*private men unconnected with any party or description of persons at home, taking no concern in the struggles at this moment making abroad, but most seriously*

* A son of the late Bishop of Carlisle, and brother to Lord Ellenborough, now residing in the United States of America—a man of great good sense, and of the purest and most honest mind and character.

‘ anxious to preserve the true liberty and unexampled prosperity we happily enjoy in this kingdom.’ My heart immediately informed me that I could zealously and firmly co-operate in such a cause, and with such independency, that I accordingly subscribed my name.

“ Upon the first day that I became a member of the above-mentioned committee, when the suppression of inflammatory publications was introduced as our primary object, I recommended, as a previous measure, the counteraction of their effects by cheap pamphlets, and gave the purport of the following extract from an Act of the Assembly of Virginia to corroborate my argument:—*‘ That it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order, and that TRUTH is great, and will prevail, if left to herself; that she is the proper and sufficient antagonist to ERROR, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous, when it is permitted freely to contradict them.’*

“ The Gentlemen of the Committee approved of my conduct, and I had the pleasure to see mildness the feature of our deliberations *that day*; but shortly after this, perceiving with regret, a deviation from your original profession, *‘ to take no concern in the struggles abroad,’* I felt myself compelled to deliver the following opinion in writing :

“ “ When I had the honour to receive a letter from the Secretary of this Society, I replied, *‘ That without*

adverting to the politics of other countries, I should be happy to co-operate for preserving liberty and property against republicans and levellers in my own.

“ ‘ I conceived it to be the express intention of the enlarged committee to counteract, by cheap publications, the delusive doctrines of seditious libellers ; I used the language of moderation the first day, and had the satisfaction to be elected, by strangers to me, for one of the sub-committee ; but, as we have lately introduced animadversions upon the French, I feel it incumbent upon me to dissent therefrom.

“ ‘ *We are looked up to as the germ of other associations ;* and it is not our duty, I trust, to revive national antipathies, which have so long distracted France and Great Britain ; the situation of the old government of France bears no analogy to that of Great Britain ; *we have not a Bastile to destroy—we have not a trial by jury to establish—the people of Great Britain are, I hope, conscious of the blessings of a free government, and are aware how very little they have to gain, and how very much to lose, by any revolution.*

“ ‘ If any emissaries are attempting to alienate the affections of His Majesty’s subjects in this country, I will cordially unite in their detection and apprehension ; but I cannot coincide with the gentlemen of this committee, in censuring the conduct of any other government, let it be ever so erroneous, or in accusing it of trying to subvert our Constitution, as it may complain to our government of such attacks, and call upon us for proof.

“ ‘ I move, therefore, that all our reasonings, and
 ‘ that all our exertions, shall be directed against false
 ‘ doctrines, and against all seditious words, writings,
 ‘ and actions whatsoever, and by whomsoever, and that
 ‘ we do not introduce the French, unless to shew that
 ‘ their arguments and measures cannot be applied to
 ‘ us.

(Signed)

‘ T. L.’

“ Upon this occasion I was gratified by seeing the committee erase those animadversions which they had previously resolved upon, because deliberation showed them to be unfounded.

“ The moderation of our measures for a few days afterwards, afforded me the sincerest satisfaction, but I felt equal surprise and regret, when the following proceedings took place upon the 11th instant.

“ ‘ *A Committee of Correspondence to be nominated, to consist of five members.*

“ ‘ *1st. This Committee may do immediately whatever is suggested by letters, or prepare for the General Committee.*

“ ‘ *2ndly. To apply to Government to direct the Solicitor of the Treasury to attend to the suggestions of this Society. This to be done by the Chairman with the Attorney General.*

“ Having been present when anonymous letters were received, darkly accusing some of the first characters in this kingdom, and even His Majesty’s Officers, which, when conveyed to Government, must necessarily excite alarm and distrust, and considering

that individuals, however innocent, had no means of refuting clandestine calumnies, I proposed, 'That the Committee of Five be directed to burn all anonymous letters accusing individuals;' but this proposition was suppressed by carrying the previous question against it.

"As I deemed myself responsible for my conduct to the Association at large, I requested the President to record the above proceeding, but he refused; I next stated to the Committee, that '*since every motion, and every voting, formed part of our proceedings,* I hoped the foregoing would be entered;' but, being put to the vote, it was negatived.

"In this predicament, I am necessitated to enumerate these particulars in this letter, that reference may be had to it, should any one attribute inconsistency to me, or charge me with a dereliction of principle. I am sincerely attached to my Sovereign and the constitution of this government, and I am ready to assist in bringing any traitor to punishment; but I should condemn myself as a false friend to all, if I acted in any measure which tended in my opinion to frustrate the intention of its promoters, and to alienate public affection.

"I have asked myself, '*Whether I should do unto others, as I would they should do unto me,*' by admitting and perusing anonymous letters?—Whether confidence, that band of harmony in society, must not be broken by such a measure? Whether suspicion has not caused horrid assassinations and convulsions? Whether any kind of inquisitorial body does not irri-

tate to commotions? In short, my conscience has admonished me, that my love of my country, and my desire of its tranquillity, all prohibit concealment.

“ It will be urged, that it is not necessary to act upon the information of nameless writers; why then, I ask, shall we wound our minds with baleful impressions, by perusing these letters? And why let men be sunk in estimation, whom we might otherwise admire?—The accused, and the person receiving the accusation, are *both* injured by an anonymous letter, if any impression is made by it; every tribunal in this country requires the impeacher to confront the person arraigned, without which we could not boast that we lived ‘*rara*’ *temporum felicitate, ubi licet sentire quod velis et dicere quod sentias.* But why do I expatiate on this head? I trust that you cannot but approve the principle which determines me to absent myself, however falsely delicate you may consider this determination.

“ I will cheerfully attend the enlarged Committee, whenever summoned; and permit me to add, that if any treasonable plots existed to my knowledge, which required *peculiar efforts*, I should never withdraw myself from any situation, however irksome, dangerous, or even opprobrious, wherein I could be of the least service to my country.

“ I remain, Gentlemen,

“ Your most obedient humble servant,

“ THOMAS LAW.”

Dec. 17,

No. 16, Weymouth Street.

To resist and to counteract the effect of proceedings so novel, so extraordinary, and so dangerous, a great many gentlemen of distinction held two public meetings, at the first of which, several resolutions were adopted; and, at the second, held on the 19th of January, 1793, the following proceedings, now re-printed, took place.

They were originally printed by the Editor, by direction of the Committee, appointed by the Meeting.

PROCEEDINGS

OF THE

FRIENDS TO THE LIBERTY OF THE PRESS.

January 19, 1793.

The Honourable THOMAS ERSKINE, M.P., in the Chair.

Mr. Erskine said, that though he did not regard calumny and misrepresentation, as far as it affected himself personally, which he took it for granted was the case with every gentleman present; yet, as far as it affected the great object for which they were assembled, it was of the highest importance to the Public: that he should, therefore, to render misrepresentation utterly impossible, read what he had to say from a paper, which he had written. He then read as follows:—

DECLARATION

OF THE

FRIENDS TO THE FREEDOM OF THE PRESS.

“ The peculiar excellence of the English Constitution, on which indeed the value of every government may be summed up, is, that it creates an equal rule of action for the whole nation, and an impartial administration of justice under it.

“ From those master principles results that happy, unsuspecting, and unsuspected freedom, which for ages has distinguished society in England, and which has united Englishmen in an enthusiasm for their country, and a reverence for their laws.

“ To maintain this fearless tranquillity of human life, the prime blessing of social union, the power of accusation was not given to *uninjured* individuals, much less to *voluntary, undefined, unauthorized* associations of men, acting without responsibility, and open to irregular and private motives of action ; but was conferred upon the supreme executive magistrate, as more likely to look down upon the mass of the community with an unimpassioned eye ; and even that wisely placed

- trust, guarded by the personal responsibility of those Officers by which the Crown is obliged to exercise its authority, and in the higher order of crimes (which on principle should extend to all), guarded once again by the office of the Grand Jury, interposed as a shield between the people and the very laws enacted by themselves.

“ Those admirable provisions appear to be founded in a deep acquaintance with the principles of society, and to be attended with the most important benefits to the Public; because, tempered again, and finally with the trial by the country, they enable the English Constitution to ratify the existence of a *strong, hereditary, executive* government, consistently with the security of popular freedom.

“ By this arrangement of the royal prerogative of accusation, so restrained and mitigated in its course, the Crown becomes an object of wholesome, but not dangerous jealousy; which, while it prevents it from overstepping its constitutional limits, endears the people to one another, from a sense of the necessity of union amongst themselves, for the preservation of their privileges against a power dangerous to remove, but equally dangerous to exist, unobserved and unbalanced.

“ Under this system, making allowance for the vices and errors inseparable from humanity, state accusations, *in modern times*, though sometimes erroneous, have not often been rash or malevolent:—The criminal under the weight of the firm hand of justice, has been supported by the indulgent fraternal tribunal of his country.

“ But under the circumstances which assemble us together, all these provisions appear to be endangered.

“ A sudden alarm has been spread through the kingdom by the ministers of the Crown, of imminent danger to the Constitution, and to all order and government. The nation has been represented to be fermenting into sedition and insurrection, through the

dangerous associations and writings of disaffected and alienated subjects; and under the pressure of this perilous conjuncture the Parliament has been suddenly assembled, and the militia embodied.

“The existence or extent of those evils, since they have been sanctioned, though not ascertained, by the authority of Parliament when assembled, we have not, upon the present occasion, assembled to debate; but we may, without sedition, congratulate our fellow-subjects, that our ministers have had the vigilance to detect those *numerous and bloody* insurrections, which otherwise might have *secreted themselves*, and passed *unknown and undiscovered*; and that, without the punishment of a single individual, for any overt act of treason, the people have recovered all that tranquillity and respect for the laws, which they appeared to us to have equally possessed at the time when the alarm burst forth.

“That large classes of the community should, nevertheless, give faith to the assertions and acts of a *responsible* government, is neither to be wondered at, nor disapproved. When the English Constitution is authoritatively represented to be in danger, we rejoice in the enthusiasm of Englishmen to support it. When that danger is further represented to have been caused or increased by the circulation of treasonable and seditious writings, we acknowledge that it is the duty of every good subject in his proper sphere, and by *proper means*, to discountenance them:—*nothing is further from the intention of this Meeting than to hold up to public disapprobation such individuals, as, from*

honest motives, have joined associations, even though they may in their zeal have shot beyond that line of exertion which we (mistakenly, perhaps, but conscientiously) conceive to be the safe limitation of assistance to executive government by private men.

“We assemble neither to reprehend, nor to dictate to others, but from a principle of public duty to enter our solemn protest against the propriety or justice of those associations, which, by the contagion of example, are spreading fast over England, supported by the subscriptions of opulent men, for the avowed object of *suppressing and prosecuting* writings:—more especially when accompanied with REWARDS TO INFORMERS; and, *above all*, when those rewards are extended (of which there are instances) to question and to punish opinions delivered even in the private intercourses of domestic life; unmixed with any act or manifested intention against the authority of the laws.

“We refrained at our former Meeting from pronouncing these proceedings to be illegal and punishable, because we must receive the rule from our statutes and precedents of law, which are silent on the subject; but we consider them to be doubtful in law, and unconstitutional in principle, from the whole theory, and all the analogies of English justice.

“In the first place, we object to them as wholly unnecessary;—and we give this objection precedence, because there ought to be a visible necessity or expediency to vindicate every innovation in the mode of administering the laws. Supposing, then, the conjuncture to be what it is by authority represented, the

Crown is possessed of the most ample powers for the administration of speedy and universal justice.

“ If the ordinary sittings of the courts are found at any time to be insufficient for the accomplishment of their jurisdictions, or if even a salutary terror is to be inspired for the general security, the *King* may appoint special commissions for the trial of offenders.

“ If the revenue devoted to the ordinary purposes of criminal justice should be found insufficient for an unusual expenditure, Parliament is ever at hand to supply the means ; and no Parliament can be supposed to refuse, or the people be suspected to murmur at, so necessary an expense.

“ If information also became necessary for the discovery and conviction of offenders, the Crown may at any time, by its authority, set even informers in motion.

“ But under all this awful process, public freedom would still be secured, while the public safety was maintained.—The Crown still acting by its officers, would continue to be responsible for the exercise of its authority ; and the community, still bound together by a common interest, and cemented by the undisturbed affections and confidences of private life, would be sound and pure for the administration of justice.

“ This we maintain and publish to be the genius of the British Constitution, as it regards the criminal law.

“ But when, without any state necessity, or requisition from the Crown, or Parliament of the kingdom, bodies of men voluntarily intrude themselves into a sort of partnership of authority with the executive power ; and when, from the universal and admitted interest

of the whole nation, in the object or *pretexts* of such associations, the people (if they continue to spread as they have done) may be said to be in a manner represented by them, where is the accused to find justice among his peers, when arraigned by such combinations?—Where is the boasted trial by the country, if the country is thus to become informer and accuser?—Where is the cautious distrust of accusation, if the Grand Jury may themselves (or some of them) have informed against the object of it, brought in the very bill which they are to find, and subscribed for the prosecution of it?—Where in the end is the mild, complacent, relenting countenance of the Jury for trial—that last consolation which the humanity of England never denied, even to men taken in arms against her laws, if the pannel is to come reeking from the vestry-rooms, where they have been listening to harangues concerning the absolute necessity of extinguishing the very crimes and the criminals, which they are to decide upon in judgment, and to condemn or acquit by their verdicts?

“But if these proceedings must thus evidently taint the administration of justice, even in the superior courts, where the Judges, from their independence, their superior learning, and their further removal from common life, may be argued to be likely to assist Juries in the due discharge of their office—what must be the condition of the courts of quarter sessions, whose jurisdictions over these offences are co-ordinate—where the Judges are the very gentlemen who lead those associations in every county and city in the king-

dom, and where the jurors are either tenants and dependants, or their neighbours in the country, justly looking up to them with confidence and affection, as their friends and protectors in the direction of their affairs? IS THIS A TRIAL BY AN ENGLISH COURT AND JURY? It would be infinitely more manly, and less injurious to the accused, to condemn him at once without a hearing, than to *mock* him with the empty forms of the British Constitution, when the substance and effect of it are destroyed.

“By these observations we mean no disrespect to the magistracies of our country. But the best men may inadvertently place themselves in situations absolutely incompatible with their duties. Our natures are human, and we err when we consider them as divine.

“These incongruities arising from this rage of popular accusation, or even of declared popular support to accusations proceeding from the Crown, are not our original observations. We are led to them by the analogies and institutions of the law itself.

“On this principle, criminals impeached, not by people heated with a sense of individual danger, and personally mixing themselves with the charge and the evidence, but, impeached by the House of Commons representing them, are tried, from the necessity of the case, by the Lords, and not by the country. This anomaly of justice arose from the humanity and wisdom of our ancestors:—they thought, that when the complaint proceeded not from the Crown, whose acts the people are accustomed to watch with jealousy, but

from the popular branch of the government, which they lean towards with favour, it was more substantial justice to the meanest man in England, to send him for trial before the Lords, though connected with him by no common interest, but, on the contrary, divided by a separate one, than to trust him to a Jury of his equals, when the *people* from which it must be taken was even in *theory* connected with the prosecution, though totally unacquainted, in fact, with its cause, or with its object.

“ We appeal with confidence to the reason of the Public, whether these principles do not apply, by the closest analogy, to the proceedings which we assemble to disapprove. Criminal jurisdictions are local; the offence must be tried in the county, and frequently in the very town, where it is charged to be committed; and thus the accused must not only stand before a Court infected by a *general prejudice*, but in a manner disqualified by a *pointed and particular passion and interest*.

“ We have further to remark, that these objections to popular associations or the prosecution of crimes, apply with double force when directed against THE PRESS, than against any *other* objects of criminal justice which can be described or imagined.

“ Associations to prosecute offences against the game laws, or frauds against tradesmen (which we select as familiar instances), though we do not vindicate them, nevertheless distinctly describe their objects, and, in suppressing illegal conduct, have no immediate tendency to deter from the exercise of rights which are

legal, and in which the Public have a deep and important interest.

“ No unqualified person can shoot or sell a hare, or a partridge, as long as a monopoly in game is suffered to continue, without *knowing* that he transgresses the law; and there can be no difference of judgment upon the existence, extent, or consequence of the offence.—The trial is of a mere *fact*.—By such associations, therefore, the Public cannot be stated to suffer further than it always suffers by an oppressive system of penal law, and by every departure from the due course of administering it.

“ In the same manner, when a swindler obtains goods on false pretences, he cannot have done so from error, the act is decisive of the intention; the law defines the crime with positive precision; and the trial is in this case, therefore, only the investigation of a fact; and in holding out terrors to swindlers, honest men are in no danger, nor does the Public suffer further than we have adverted to.

“ These associations besides, from their very natures, cannot be so *universal*, as to disqualify the *country at large* by prejudice or interest from the office of trial;—they are bottomed besides, particularly the last (which is a most material distinction), upon crimes, the perpetration of which is injurious to individuals *as such*, and which each individual in his own personal right might legally prosecute: whereas we assemble to object to the popular prosecution of those *public* offences, which the Crown, if they exist, is bound in duty to prosecute by the Attorney General;—where no individual can

count upon a personal injury ;—and where the personal interest of the subject is only as a member of that Public, which is committed to the care of the executive authority of the country.

“ The press, therefore, as it is to be affected by associations of individuals to fetter its general freedom, *wholly unconnected with any attack upon private character*, is a very different consideration ; for if THE NATION is to be combined to suppress writings, without further describing what those writings are, than by the general denomination—*sedition* ; and if the exertions of these combinations are not even to be confined to suppress and punish the circulation of books, *already condemned by the judgments of Courts*, but are to extend to whatever does not happen to fall in with *their* private judgments :—if every writing is to be prosecuted which *they* may not have the sense to understand, or the virtue to practise ;—if no man is to write but upon *their* principles, nor can read with safety except what *they* have written, lest he should accidentally talk of what he has read ;—no man will venture either to write or to speak upon the topics of government or its administration—a freedom which has ever been acknowledged by our greatest statesmen and lawyers to be the principal safeguard of that Constitution, which liberty of thought originally created, and which a FREE PRESS for its circulation gradually brought to maturity.

“ We *will*, therefore, *maintain* and *assert* by all legal means, this sacred and essential privilege, the parent and guardian of every other. We *will maintain*

and *assert* the right of instructing our fellow-subjects by every sincere and conscientious communication which may promote the public happiness; and while we render obedience to Government and to law, we *will* remember at the same time, that as they exist by the people's consent, and for the people's benefit, they have a right to examine their principles, to watch over their due execution, and to preserve the beautiful structure of their political system, by pointing out, as they arise, those defects and corruptions which the hand of time never fails to spread over the wisest of human institutions.

“If in the legal and peaceable assertion of this freedom, we shall be calumniated and persecuted, we must be contented to suffer in the cause of freedom, as our fathers before us have suffered; but we will, like our fathers, also persevere until we prevail.

“Let us, however, recollect with satisfaction, that the law as it stands at this very moment (thanks to our illustrious patriot, Mr. Fox, who brought forward the Libel bill), is amply sufficient for the protection of the Press, if the country will be but true to itself. The extent of the genuine Liberty of the Press on *general* subjects, and the boundaries which separate them from licentiousness, the English law has wisely not attempted to define; they are, indeed, in their nature undefinable; and it is the office of the Jury alone, taken from the county in each particular instance to ascertain them, and the trust of the Crown, where no individual is slandered, to select the instances for trial by its ministers, responsible to Parliament.

“ This system appears to us amply to secure the Government, while it equally protects the subject ; but if this selection is to be transferred to self-constituted assemblies of men, agitated by a zeal, however honest, the Press must be broken up, and individuals must purchase their safety by ignorance and silence.

“ In such a state, we admit that the other liberties, which we enjoy under the laws, might nevertheless continue as long as government might happen to be justly administered ; but should corruption or ambition ever direct their efforts against them, the nation would be surprised and enslaved—surprised by the loss of their wakeful sentinels, whom they had shot for only being at their posts, and enslaved from the loss of their armour, which their adversary, under the pretence of a treaty, had cajoled them to throw away.

“ But these evils become not only greater, but absolutely intolerable, when extended to the stimulation of spies to stab domestic peace, to watch for the innocent in the hours devoted to convivial happiness, and to disturb the sweet repose of private life upon the bosom of friendship and truth.

“ It is justly observed by the celebrated Judge Forster, that words are transitory and fleeting, easily forgotten, and subject to mistaken interpretations.— Shall their very existence then—and their criminality, as depending upon context, or sequel, or occasion— shall all rest on the oaths of hired informers ? Is *this*, in the end of the eighteenth century, to be the condition of our cheerful country ?—Are these to be our chains ?—And are we, after we have broken them on the heads

of tyrants in former ages, to sit down to forge them again for ourselves, and to fasten them on one another?

“ Our last, and not the least objection to popular accusation is the love we bear to the Government of England, and our wish that its functions may be perpetual: it being our opinion, as expressed in our seventh resolution, at our former Meeting,

“ That a system of jealousy and arbitrary coercion of the people has been at all times dangerous to the stability of the English Government. For the truth of which we appeal to human nature in general, to the characteristic of Englishmen in particular, and to the history of the country.

“ In the career of such a system of combination, we foresee nothing but oppression ; and when its force is extinguished, nothing but discontent, disobedience and misrule.—If Government permits or countenances this distribution of its executive powers, how is it to resume them should opinions change, and run the other way ? From the artifices and ambition of designing men, the best governments may, for a season, be unpopular, as we know from experience, that the very worst may triumph for a while by imposture. Should such a change of opinion arrive, as in the nature of things it must, the administration of government and justice will be distracted and weakened. It will be in vain to inculcate that subjects may persecute one another by combination, but that they must not combine for their common defence :—and as, in this unnatural tide of flood, no man may expect to be acquitted, however he

may love his country ; so, in the ebb of the same tide, equally unnatural, it may be difficult to bring to conviction, even those who may be plotting its destruction. Against both these departures, from the even and usual course of justice, and all their consequences, we *equally*, and with an *impartial* spirit, protest.

“ When we consider the great proportion of the community, that has already *hastily* sanctioned the proceedings which we dissent from, the great authority that countenances them, the powerful influence which supports them, and the mighty revenue raised upon the people, which through various channels rewards many of those who lead the rest ; we are aware of the difficulties which this Address has to encounter ; and judging of man from his nature and his history, we expect no *immediate* success from our interposition. But we believe that the season of reflection is not far distant, when this humble effort for the Public will be remembered, and its authors be vindicated by the people of Great Britain.”

Mr. Sheridan said, that the very able and eloquent paper which they now had the happiness to hear read by the author himself, contained political opinions so strongly enforced, and displayed the truth in so irresistible a form, that the whole Society had but one sentiment as to its merits. He agreed with his Honourable Friend in every syllable he had advanced. It was an admirable protest, and might serve to convey to the world the principles of the Society. He therefore

recommended it to be adopted by the Meeting as their DECLARATION. The Learned Gentleman now appeared in a new and honourable character ; and while he gave a proof of his manly firmness, he acted with peculiar delicacy and moderation. . When these sentiments were announced, the world would be convinced, that the friends of real freedom were not to be subdued or overawed by the wretched artifice of Government. The present Meeting had been treated by Administration, not with levity, but alarm. They would, however, be soon fully persuaded, that this juggling plan of policy could no longer be concealed ; that their appeal to the rabble would not avail ; and that the people could not dread thunder while the sky was clear : in short, that their deceptive measures would soon be exploded ; and that the good sense of Englishmen would revolt at violated rights and expiring liberty. With regard to the author of the excellent paper, he begged leave to say a few words. The new character which he now acted must afford the most lively sensations. If private individuals rejoiced when Mr. Erskine stood forward as their advocate, how much more must that pleasure be increased, when he now appeared as the advocate of the nation at large ! retained by the honourable impulse of his heart, and rewarded by the affections of the people ! He volunteered his transcendant talents, in the most disinterested way. Scorning a brief or fee, he courted no other reward than the applause of his fellow-citizens—he had no other object in view than the good of mankind. This pursuit was the noblest gratification of a great

and a good mind. Convinced of the truths contained in the inestimable paper, he moved, that it should be adopted as the creed or declaration of the Society; that it should be published to the world at large as their protest against the associations; and that the members of those clubs be permitted to answer it—if they could. Mr. Sheridan then moved, “That the “paper then read be adopted as the DECLARATION OF “THE FRIENDS TO THE FREEDOM OF THE PRESS;” which motion was immediately carried without a dissenting voice; and in a short time the Declaration received above five hundred most respectable signatures.

To appreciate the merit or propriety of the foregoing composition, is foreign to the Editor's design, who has not, in any one instance, presumed to introduce criticism of praise or blame, or to deliver any opinion of his own, regarding the subjects of the publication; but he cannot forbear observing, without departing from this rule, that the Declaration above mentioned, is in perfect conformity with the principles which characterize all Lord Erskine's pleadings, which the Editor has here collected. As a politician, he may have been mistaken in thinking that the country was in no danger from domestic enemies, at the period of this Declaration; but still its great object would remain untouched—THE SUPPORT OF THE REGULAR, UNPAID, UNDISTURBED DOMINION OF THE LAW;—this appears to have been not only the Author's characteristic, but his ruling passion; and we cannot, therefore, better conclude this Collection than by the concluding sentence of the eloquent criticism upon the two first volumes, in the Edinburgh Review :

“ While the administration of the law flows in such
“ pure channels—while the Judges are incorruptible,
“ and are watched by the scrutinizing eyes of an en-
“ lightened Bar, as well as by the jealous attention of
“ the country—while Juries continue to know, and to
“ exercise their high functions, and a single advocate
“ of honesty and talents remains—thank God, happen
“ what will in other places, our personal safety is be-
“ yond the reach of a corrupt ministry and their venal
“ adherents. Justice will hold her even balance, in
“ the midst of hosts armed with gold or with steel ;
“ the law will be administered steadily, while the prin-
“ ciples of right and wrong—the evidence of the senses
“ themselves—the very axioms of arithmetic—may
“ seem, elsewhere, to be mixed in one giddy and inex-
“ tricable confusion ; and, after every other plank of
“ the British Constitution shall have sunk below the
“ weight of the Crown, or been stove in by the vio-
“ lence of popular commotion, that one will remain,
“ to which we are ever fondest of clinging, and by
“ which we can always most securely be saved.”

SPEECHES
OF
LORD ERSKINE,
WHEN AT THE BAR,
ON
MISCELLANEOUS SUBJECTS.

ST. EPOCH'S

LORD BRISKINE

WHEN AT THE BAR

ALLEGEDLY SUICIDES

MR. ERSKINE'S SPEECH

FOR

JAMES HADFIELD,

IN THE COURT OF KING'S BENCH, ON A TRIAL AT BAR,

On the 26th of April, A.D. 1800.

PREFACE.

THE occasion of the trial of James Hadfield for high treason, in shooting at the King, at Drury Lane play-house, is too well remembered to require much preface. All the facts, besides, which led to the Prosecution, and which ended in the acquittal of the Defendant, on the ground of his having committed the act under the dominion of insanity, are fully detailed in the following defence by his Counsel.

The successful issue of this trial, notwithstanding the warm and just interest which the whole nation took in the life of a Prince, who had reigned in their affections for so many years, must ever be considered as a most striking instance of that cool, deliberate, and impartial administration of justice, which, since the glorious Revolution (for we can go no higher), has distinguished this country. What renders this Speech the more interesting and important, is the few instances which have occurred in our Courts, where it has become necessary to consider, and *with the utmost precision* to determine, *in what cases* mental derangement ought to be held

to emancipate such unhappy persons from responsibility to the laws, for acts of great atrocity and violence. It is by no means every departure from sound reason and intellect, though sufficient to ground a commission of lunacy, and to deprive an individual of the management of his concerns, that would deliver him from an indictment of murder, or other criminal act of violence; *the act itself* must appear to have been committed under the full dominion of insanity; and Lord Erskine, therefore, took his stand upon the surest and safest ground, as it related to the safety of the Public; and, therefore, the surest and safest for the unhappy Prisoner; having, probably, a full security in bringing his case within his principle, as appeared by the result of the trial, he took his claim of impunity *as low as possible*, and properly maintained the privilege of indemnity for those distempered persons *ONLY* who commit crimes under the dominion of *morbid delusions*; but by no means extending to those whose insanity, *without delusion*, is principally characterized by *violence and turbulent passion*. The principle is of the utmost importance, and the more so from the assent which it received from the Court of King's Bench, on a solemn trial at the Bar. Lord Kenyon appeared much against the Prisoner, in the course of the evidence for the Crown: but after the disclosure of the principle on which his defence was grounded, and the statement of the evidence which would be given to support it, he became convinced, as it was proceeded on; and on its coming up to the principal facts detailed in the following Speech, his Lordship, with that justice and feeling which eminently marked his character, delivered his opinion to the Attorney-General (as the opinion of the whole Court), that the trial should not be further proceeded in; which being acquiesced in by the present Lord Redesdale, then Attorney-General, and the other Counsel for the Crown, no reply was made to the Prisoner's defence—and he was acquitted.

It was said at the time, that the very learned Counsel for

the Crown were not entirely satisfied with the view taken of the case by the Court (but of the truth of which we have no means of information). Be that, however, as it may—it is one of the noblest features in the practice of our criminal law, that, although Counsel are by no means bound to acquiesce in an opinion by the Judges, adverse to a Prisoner upon a capital trial; yet when the opinion is in favour of life—above all, upon the view taken, even by a single Judge, much more by a whole Court, *upon the evidence for the party accused*; it would not be considered consonant to the mild characteristic of our laws for the ministers of the Crown to step beyond the Judges in the demand of criminal justice.

GENTLEMEN OF THE JURY,

THE scene which we are engaged in, and the duty which I am not merely *privileged*, but *appointed* by the authority of the Court to perform, exhibits to the whole civilized world a perpetual monument of our national justice.

The transaction, indeed, in every part of it, as it stands recorded in the evidence already before us, places our country, and its government, and its inhabitants, upon the highest pinnacle of human elevation. It appears, that upon the 15th day of May last, His Majesty, after a reign of forty years, not merely in sovereign *power*, but spontaneously in the very hearts of his people, was openly shot at (or to all appearance shot at) in a public theatre in the centre of his capital, and amidst the loyal plaudits of his subjects, YET NOT A HAIR OF THE HEAD OF THE SUPPOSED ASSASSIN WAS TOUCHED. In this unparalleled scene of calm forbearance, the King himself, though he stood first in personal interest and feeling as well as in command, was a singular and fortunate example.—The least appearance of emotion on the part of that august personage, must unavoidably have produced a scene quite different, and far less honourable than the Court is now witnessing; but His Majesty remained unmoved, and the person *apparently* offending was only secured, without injury or reproach, for the business of this day.

Gentlemen, I agree with the Attorney-General (in-

deed, there can be no possible doubt), that if the same pistol had been maliciously fired by the Prisoner in the same theatre, at the meanest man within its walls, he would have been brought to *immediate* trial, and, if guilty, to immediate execution.—He would have heard the charge against him for the first time when the Indictment was read upon his arraignment.—He would have been a stranger to the names and even to the existence of those who were to sit in judgment upon him, and of those who were to be the witnesses against him; but upon the charge of even this *murderous* attack upon the King himself, he is covered all over with the armour of the law. He has been provided with Counsel by the King's own Judges, and not of *their* choice, but of *his own*. He has had a copy of the Indictment ten days before this trial.—He has had the names, descriptions, and abodes of all the Jurors returned to the Court; and the highest privilege of peremptory challenges derived from, and safely directed by that indulgence.—He has had the same description of every witness who could be received to accuse him; and there must at this hour be *twice* the testimony against him as would be legally competent to establish his guilt on a similar prosecution by the meanest and most helpless of mankind.

Gentlemen, when this melancholy catastrophe happened, and the Prisoner was arraigned for trial, I remember to have said to some now present, that it was, at first view, difficult to bring those indulgent exceptions to the general rules of trial within the principle which dictated them to our humane ancestors in cases of reasons against the political government,

or of *rebellious* conspiracy against the person of the King. In *these* cases, the passions and interests of great bodies of powerful men being engaged and agitated, a counterpoise became necessary to give composure and impartiality to criminal tribunals; but a *mere murderous* attack upon the King's person, not at all connected with his political character, seemed a case to be ranged and dealt with like a similar attack upon any private man.

But the wisdom of the law is greater than any man's wisdom; how much more, therefore, than mine! An attack upon the King is considered to be parricide against the state, and the Jury and the witnesses, and even the Judges, are the children. It is fit, on that account, that there should be a solemn pause before we rush to judgment; and what can be a more sublime spectacle of justice than to see a statutable disqualification of a whole nation for a limited period, a fifteen days' *quarantine* before trial, lest the mind should be subject to the contagion of partial affections!*

From a Prisoner so protected by the benevolence of our institutions, the utmost good faith would, on his part, be due to the public if he had consciousness and reason to reflect upon the obligation.—The duty, therefore, devolves on *me*, and, *upon my honour*, it shall be fulfilled. I will employ no artifices of speech.—I claim only the strictest protection of the law for the unhappy man before you. I should, indeed, be ashamed if I were to say any thing of the rule *in the abstract* by which he is to be judged, which I did not honestly feel; and I am sorry, therefore, that the sub-

* There must be fifteen days between arraignment and trial.

ject is so difficult to handle with brevity and precision. Indeed, if it could be brought to a clear and simple criterion, which could admit of a dry admission or contradiction, there might be very little difference, *perhaps none at all*, between the Attorney-General and myself, upon the principles which ought to govern your verdict; but this is not possible, and I am, therefore, under the necessity of submitting to you, and to the Judges, for their direction (and at greater length than I wish), how I understand this difficult and momentous subject.

The law, as it regards this most unfortunate infirmity of the human mind, like the law in all its branches, aims at the utmost degree of precision; but there are some subjects, as I have just observed to you, and the present is one of them, upon which it is extremely difficult to be precise. The general principle is clear, but the application is most difficult.

It is agreed by all jurists, and is established by the law of this and every other country, that it is the REASON OF MAN which makes him accountable for his actions; and that the deprivation of reason acquits him of crime.—This principle is indisputable; yet so fearfully and wonderfully are we made, so infinitely subtle is the spiritual part of our being, so difficult is it to trace with accuracy the effect of diseased intellect upon human action, that I may appeal to all who hear me, whether there are any causes more difficult, or which, indeed, so often confound the learning of the Judges themselves, as when insanity, or the effects and consequences of insanity, become the subjects of legal

consideration and judgment. I shall pursue the subject as the Attorney-General has properly discussed it. I shall consider insanity, as it annuls a man's dominion over property ; as it dissolves his contracts, and other acts, which otherwise would be binding ; and as it takes away his responsibility for crimes. If I could draw the line in a moment between these two views of the subject, I am sure the Judges will do me the justice to believe, that I would fairly and candidly do so ; but great difficulties press upon my mind, which oblige me to take a different course.

I agree with the Attorney-General, that the law, in neither civil nor criminal cases, will measure the degrees of men's understandings ; and that a *weak* man, however much below the ordinary standard of human intellect, is not only responsible for crimes, but is bound by his contracts, and may exercise dominion over his property. Sir Joseph Jekyll, in the Duchess of Cleveland's case, took the clear legal distinction, when he said, "*The law will not measure the sizes of men's capacities, so as they be* COMPOS MENTIS."

Lord Coke, in speaking of the expression NON COMPOS MENTIS, says, "*Many times, as here, the Latin word expresses the true sense, and calleth him not amens, demens, furiosus, lunaticus, fatuus, stultus, or the like, for non compos mentis is the most sure and legal.*" He then says, "*Non compos mentis is of four sorts : first, ideota, which, from his nativity, by a perpetual infirmity, is NON COMPOS MENTIS ; secondly, he that by sickness, grief, or other accident, wholly loses his memory and understanding ; third, a*

“ *lunatic that hath sometimes his understanding, and*
 “ *sometimes not ; aliquando gaudet lucidis intervallis ;*
 “ *and therefore he is called non compos mentis so long*
 “ *as he hath not understanding.*”

But notwithstanding the precision with which this great author points out the different kinds of this unhappy malady, the nature of his work, in this part of it, did not open to any illustration which it can now be useful to consider. In his Fourth Institute he is more particular ; but the admirable work of Lord Chief Justice Hale, in which he refers to Lord Coke’s Pleas of the Crown, renders all other authorities unnecessary.

Lord Hale says, “ There is a partial insanity of mind,
 “ and a total insanity. The former is either in respect
 “ to things, quoad hoc vel illud insanire. Some per-
 “ sons, that have a competent use of reason in respect
 “ of some subjects, are yet under a particular dementia
 “ in respect of some particular discourses, subjects, or
 “ applications : or else it is partial in respect of degrees ;
 “ and this is the condition of very many, especially
 “ melancholy persons, who for the most part discover
 “ their defect in excessive fears and griefs, and yet are
 “ not wholly destitute of the use of reason ; and this
 “ partial insanity seems not to excuse them in the
 “ committing of any offence for its matter capital ; for
 “ doubtless most persons, that are felons of themselves
 “ and others, are under a degree of partial insanity,
 “ when they commit these offences. It is very difficult
 “ to define the invisible line that divides perfect and
 “ partial insanity ; but it must rest upon circumstances
 “ duly to be weighed and considered both by Judge

“and Jury, lest on the one side there be a kind of
“inhumanity towards the defects of human nature; or,
“on the other side, too great an indulgence given to
“great crimes.”

Nothing, Gentlemen, can be more accurately nor more humanely expressed; but the application of the rule is often most difficult. I am bound, besides, to admit that there is a wide distinction between civil and criminal cases.—If, in the former, a man appears, upon the evidence, to be *non compos mentis*, the law avoids his act, though it cannot be traced or connected with the morbid imagination which constitutes his disease, and which may be extremely partial in its influence upon conduct; but to deliver a man from responsibility for crimes, above all, for crimes of great atrocity and wickedness, I am by no means prepared to apply this rule, however well established, when property only is concerned.

In the very recent instance of Mr. Greenwood (which must be fresh in his Lordship's recollection), the rule in civil cases was considered to be settled. That gentleman, whilst insane, took up an idea that a most affectionate brother had administered poison to him.—Indeed, it was the prominent feature of his insanity.—In a few months he recovered his senses.—He returned to his profession as an advocate; was sound and eminent in his practice, and in all respects a most intelligent and useful member of society; but he could never dislodge from his mind the morbid delusion which disturbed it; and under the pressure, no doubt, of that diseased prepossession, he disinherited his

brother. The cause to avoid this will was tried here. —We are not now upon the evidence, but upon the principle adopted as the law. The Noble and Learned Judge, who presides upon this trial, and who presided upon that, told the Jury, that if they believed Mr. Greenwood, when he made the will, to have been *insane*, the will could not be supported, whether it had disinherited his brother, or not ; that the act, no doubt, strongly confirmed the existence of the false idea which, if believed by the Jury to amount to *madness*, would equally have affected his testament, if the brother, instead of being disinherited, had been in his grave ; and that, on the other hand, if the unfounded notion did not amount to madness, its influence could not vacate the devise.* This principle of law appears to be sound and reasonable, as it applies to civil cases, from the extreme difficulty of tracing with precision the secret motions of a mind, deprived by disease of its soundness and strength.

Whenever, therefore, a person may be considered *non compos mentis*, all his *civil* acts are void, whether they can be referred, or not, to the morbid impulse of his malady, or even though, to all *visible appearances*, totally separated from it ; but I agree with Mr. Justice Tracey, that it is not every man of an idle, frantic appearance and behaviour, who is to be considered as a lunatic, either as it regards obligations or crimes ; but that he must appear to the Jury to be *non compos mentis*, in the legal acceptance of the term ; and that,

* N.B. The Jury found for the will ; but after a contrary verdict in the Common Pleas, a compromise took place.

not at any *anterior period*, which can have no bearing upon any case whatsoever, but at *the moment* when the contract was entered into, or the crime committed.

The Attorney-General, standing undoubtedly upon the most revered authorities of the law, has laid it down, that to protect a man from *criminal responsibility* there must be a *TOTAL deprivation of memory and understanding*. I admit that this is the very expression used, both by Lord Coke and Lord Hale; but the true interpretation of it deserves the utmost attention and consideration of the Court. If a *TOTAL deprivation of memory* was intended by these great lawyers to be taken in the *literal* sense of the words:—if it was meant, that, to protect a man from punishment, he must be in such a state of prostrated intellect, as not to know his name, nor his condition, nor his relation towards others—that if a husband, he should not know he was married; or, if a father, could not remember that he had children; nor know the road to his house, nor his property in it—then no much madness ever existed in the world. It is *IDEOCY* alone which places a man in this helpless condition; where, from an *original* mal-organization, there is the human frame alone without the human capacity; and which, indeed, meets the very definition of Lord Hale himself, when, referring to Fitzherbert, he says: “Ideocy or “*fatuity à nativitate, vel dementia naturalis*, is such a “one as described by Fitzherbert, who knows not to “tell twenty shillings, nor knows his own age, or who “was his father.” But in all the cases which have filled Westminster Hall with the most complicated

considerations—the lunatics, and other insane persons who have been the subjects of them, have not only had memory, *in my sense of the expression*—they have not only had the most perfect knowledge and recollection of all the relations they stood in towards others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable—the disease consisting in the delusive sources of thought :—all their deductions within the scope of the malady, being founded upon the *immoveable* assumption of matters as *realities*, either without any foundation whatsoever, or so distorted and disfigured by fancy, as to be almost nearly the same thing as their creation. It is true, indeed, that in some, perhaps in many cases, the human mind is stormed in its citadel, and laid prostrate under the stroke of frenzy; these unhappy sufferers, however, are not so much considered, by physicians, as maniacs; but to be in a state of delirium as from fever. There, indeed, all the ideas are overwhelmed—for reason is not merely disturbed, *but driven wholly from her seat*.—Such unhappy patients are unconscious, therefore, except at short intervals, even of external objects; or, at least, are wholly incapable of considering their relations. Such persons, *and such persons alone* (except ideots), *are wholly deprived of their* UNDERSTANDINGS, in the Attorney-General's seeming sense of that expression. But these cases are not only extremely rare, but never can become the subjects of judicial difficulty. There can be but one judgment concerning them. In other

cases, Reason is not driven from her seat, but Distraction sits down upon it along with her, holds her, trembling, upon it, and frightens her from her propriety. Such patients are victims to delusions of the most alarming description, which so overpower the faculties, and usurp so firmly the place of realities, as not to be dislodged and shaken by the organs of perception and sense: in such cases the images frequently vary, but in the same subject are generally of the same terrific character.—Here, too, no judicial difficulties can present themselves; for who could balance upon the judgment to be pronounced in cases of such extreme disease? Another class, branching out into almost infinite subdivisions, under which, indeed, the former, and every case of insanity may be classed, is, where the delusions are not of that frightful character—but infinitely various, and often extremely *circumscribed*; yet where imagination (*within the bounds of the malady*) still holds the most uncontrollable dominion over reality and fact: *and these are the cases which frequently mock the wisdom of the wisest in judicial trials*; because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of mankind: their conclusions are just, and frequently profound; but the *premises from which they reason, WHEN WITHIN THE RANGE OF THE MALADY*, are uniformly false:—not false from any defect of knowledge or judgment; but, because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance, because unconscious of attack.

Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity ; and where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted ; and if courts of law were to be governed by any other principle, every departure from sober, rational conduct would be an emancipation from criminal justice. I shall place my claim to your verdict upon no such dangerous foundation.—I must convince you, not only that the unhappy Prisoner was a lunatic, within my own definition of lunacy, but that the act in question was the IMMEDIATE UNQUALIFIED OFFSPRING OF THE DISEASE. In *civil* cases, as I have already said, the law avoids every act of the lunatic during the period of the lunacy ; although the delusion may be extremely circumscribed ; although the mind may be quite sound in all that is not within the shades of the very partial eclipse ; and although the act to be avoided can in no way be connected with the influence of the insanity ;—but to deliver a lunatic from responsibility to *criminal* justice, above all, in a case of such atrocity as the present, the relation between the disease and the act should be apparent. Where the connexion is doubtful, the judgment should certainly be most indulgent, from the great difficulty of diving into the secret sources of a disordered mind :—but still, I think, that, as a doctrine of law, the delusion and the act should be connected.

You perceive, therefore, Gentlemen, that the Prisoner, in naming me for his Counsel, has not obtained the assistance of a person who is disposed to carry the doctrine of insanity in his defence, so far as even the

books would warrant me in carrying it. Some of the cases, that of Lord Ferrers, for instance, which I shall consider hereafter, distinguished from the present, would not, in my mind, bear the shadow of an argument, as a defence against an indictment for murder; I cannot allow the protection of insanity to a man who only exhibits violent passions and malignant resentments, acting upon *real circumstances*; who is impelled to evil from no morbid delusions; but who proceeds upon the ordinary perceptions of the mind.—I cannot consider such a man as falling within the protection which the law gives, and is bound to give, to those whom it has pleased God, for mysterious causes, to visit with this most afflicting calamity.

He alone can be so emancipated, whose disease (call it what you will) consists, not merely in seeing with a prejudiced eye, or with odd and absurd particularities, differing, in many respects, from the contemplations of sober sense, upon the actual existences of things; but, *he only* whose whole reasoning and corresponding conduct, though governed by the ordinary dictates of reason, proceed upon something which has no foundation or existence.

Gentlemen, it has pleased God so to visit the unhappy man before you;—to shake his reason in its citadel;—to cause him to build up as realities, the most impossible phantoms of the mind, and to be impelled by them as motives *irresistible*: the whole fabric being nothing but the unhappy vision of his disease—existing no where else—having no foundation whatsoever in the very nature of things.

Gentlemen, it has been stated by the Attorney-Gener-

ral, and established by evidence, which I am in no condition to contradict, nor have, indeed, any interest in contradicting, that, when the Prisoner bought the pistol which he discharged at, or *towards* His Majesty, he was well acquainted with the nature and use of it ;—that, as a soldier, he could not but know that in his hands it was a sure instrument of death ;—that, when he bought the gunpowder, he knew it would prepare the pistol for its use ;—that when he went to the playhouse, he knew he was going there, and every thing connected with the scene, as perfectly as any other person.—I freely admit all this; I admit, also, that every person who listened to his conversation, and observed his deportment upon his apprehension, must have given precisely the evidence delivered by His Royal Highness the Duke of York : and that nothing like insanity appeared to those who examined him.—But what then ? I conceive, Gentlemen, that *I* am more in the habit of examination, than either that illustrious person, or the witnesses from whom you have heard this account ; yet I well remember, (indeed I never can forget it,) that since the Noble and Learned Judge has presided in this Court, I examined, for the greater part of a day, in this very place, an unfortunate gentleman who had indicted a most affectionate brother, together with the keeper of a madhouse at Hoxton, for having imprisoned him as a lunatic ; whilst, according to his evidence, he was in his perfect senses. I was, unfortunately, not instructed in what his lunacy consisted, although my instructions left me no doubt of the fact ; but, not having the clue, he completely foiled me in

every attempt to expose his infirmity. You may believe that I left no means unemployed which long experience dictated; but without the smallest effect. The day was wasted, and the Prosecutor, by the most affecting history of unmerited suffering, appeared to the Judge and Jury, and to a humane English audience, as the victim of the most wanton and barbarous oppression: at last Dr. Sims came into Court, who had been prevented, by business, from an earlier attendance;—and whose name, by the bye, I observe to-day in the list of the witnesses for the Crown. From Dr. Sims I soon learned that the very man whom I had been above an hour examining, and with every possible effort which Counsel are so much in the habit of exerting, believed himself to be *the Lord and Saviour of mankind*; not merely *at the time of his confinement*, which was alone necessary for my defence; *but during the whole time that he had been triumphing over every attempt to surprise him in the concealment of his disease*. I then affected to lament the indecency of my ignorant examination, when he expressed his forgiveness, and said, with the utmost gravity and emphasis, in the face of the whole Court, “I AM THE CHRIST;” and so the cause ended. Gentlemen, this is not the only instance of the power of concealing this malady; I could consume the day if I were to enumerate them; but there is one so extremely remarkable, that I cannot help stating it.

Being engaged to attend the assizes at Chester upon a question of lunacy, and having been told that there had been a memorable case tried before Lord Mans-

field in this place, I was anxious to procure a report of it; and from that great man himself (who within these walls will ever be revered, being then retired in his extreme old age, to his seat near London, in my own neighbourhood) I obtained the following account of it: "A man of the name of Wood," said Lord Mansfield, "had indicted Dr. Monro for keeping him as a prisoner (I believe in the same madhouse at Hoxton) when he was sane. He underwent the most severe examination by the Defendant's Counsel without exposing his complaint; but Doctor Battye, having come upon the Bench by me, and having desired me to ask him what was become of the PRINCESS whom he had corresponded with in cherry-juice, he showed in a moment what he was. He answered, that there was nothing at all in that, because, having been (as every body knew) imprisoned in a high tower, and being debarred the use of ink, he had no other means of correspondence but by writing his letters in cherry-juice, and throwing them into the river which surrounded the tower, where the Princess received them in a boat. There existed, of course, no tower, no imprisonment, no writing in cherry-juice, no river, no boat; but the whole the inveterate phantom of a morbid imagination.—I immediately," continued Lord Mansfield, "directed Dr. Monro to be acquitted; but this man, Wood, being a merchant in Philpot Lane, and having been carried through the city in his way to the madhouse, he indicted Dr. Monro over again, for the trespass and imprisonment *in London*, knowing that he had lost his cause by speaking of the Princess at Westminster; and

such," said Lord Mansfield, "is the extraordinary subtlety and cunning of madmen, that when he was cross-examined on the trial in London, as he had successfully been before, in order to expose his madness, all the ingenuity of the Bar, and all the authority of the Court, could not make him say a single syllable upon that topic, which had put an end to the Indictment before, although he still had the same indelible impression upon his mind, as he signified to those who were near him; but, conscious that the delusion had occasioned his defeat at Westminster, he obstinately persisted in holding it back."*

Now, Gentlemen, let us look to the application of these cases. I am not examining, *for the present*, whether either of these persons ought to have been acquitted, *if they had stood in the place of the Prisoner now before you*; that is quite a distinct consideration, which we shall come to hereafter.—The direct application of them is *only this*: that if I bring before you such evidence of the Prisoner's insanity as, *if believed to have really existed*, shall, in the opinion of the Court, as the rule for your verdict in point of law, be sufficient for his deliverance, then that you ought not to be shaken in giving full credit to such evidence, notwithstanding the report of those who were present at his apprehension, *who describe him as discovering no symptom whatever of mental incapacity or disorder*; because I have shown you that insane persons frequently appear in the utmost state of ability and composure, even in

* This evidence at Westminster was then proved against him by the short-hand writer.

the highest paroxysms of insanity, except when frenzy is the characteristic of the disease. In this respect, the cases I have cited to you, have the most *decided application*; because they apply to the overthrow of the whole of the evidence, (admitting at the same time the truth of it,) by which the Prisoner's case can alone be encountered.

But it is said, that whatever delusions may overshadow the mind, every person ought to be responsible for crimes, *who has the knowledge of good and evil*. I think I can presently convince you, that there is something too general in this mode of considering the subject; and you do not, therefore, find any such proposition in the language of the celebrated writer alluded to by the Attorney-General in his speech. Let me suppose that the character of an insane delusion consisted in the belief that some given person was any brute animal, or an inanimate being, (and such cases have existed,) and that upon the trial of such a lunatic for murder, you firmly, upon your oaths, were convinced, upon the uncontradicted evidence of an hundred persons, that he believed the man he had destroyed, to have been a potter's vessel; that it was quite impossible to doubt that fact, *although to all other intents and purposes he was sane*; conversing, reasoning, and acting, as men not in any manner tainted with insanity, converse, and reason, and conduct themselves: suppose, further, that he believed the man whom he destroyed, but whom he destroyed as a potter's vessel, to be the property of another; and that he had malice against such supposed person, and that he meant to injure

him, knowing the act he was doing to be malicious and injurious, and that, in short he had full knowledge of all the principles of good and evil ; yet would it be possible to convict such a person of murder, if, from the influence of his disease, he was ignorant of the relation he stood in to the man he had destroyed, and was utterly *unconscious* that he had struck at the life of a human being ? I only put this case, and many others might be brought as examples to illustrate, that the knowledge of good and evil is too general a description.

I really think, however, that the Attorney-General and myself do not, in substance, very materially differ ; because, from the whole of his most able speech, taken together, his meaning may, I think, be thus collected ; that where the act which is criminal, is done under the dominion of malicious mischief and wicked intention, although such insanity might exist in a corner of the mind, as might avoid the acts of the delinquent, as a lunatic, in a civil case, yet that he ought not to be protected, if malicious mischief, and not insanity, had impelled him to the act for which he was criminally to answer : because, in such a case, the act might be justly ascribed to malignant motives and not to the dominion of disease.—I am not disposed to dispute such a proposition, in a case which would apply to it, and I can well conceive such cases may exist. The question, therefore, which you will have to try is this : Whether, when this unhappy man discharged the pistol in a direction which convinced, and ought to convince every person that it was pointed at the person of the

King, he meditated mischief and violence to His Majesty, or whether he came to the theatre (*which it is my purpose to establish*) under the dominion of the most melancholy insanity that ever degraded and overpowered the faculties of man. I admit that when he bought the pistol and the gunpowder to load it, and when he loaded it, and came with it to the theatre, and lastly, when he discharged it; every one of these acts would be overt acts of compassing the King's death, if, at all or *any* of these periods he was actuated by that *mind and intention*, which would have constituted murder in the case of an individual, if the individual had been actually killed.—I admit also, that the mischievous, and, in this case, the traitorous intention must be inferred from all these acts, unless *I can rebut the inferences by proof*. If I were to fire a pistol towards you, Gentlemen, where you are now sitting, the act would undoubtedly infer malice. *The whole proof, therefore, is undoubtedly cast upon ME.*

In every case of treason or murder, which are precisely the same, except that the unconsummated intention in the case of the King, is the same as the actual murder of a private man, the Jury must impute to the person whom they condemn by their verdict, *the motive* which constitutes the crime; and your province to-day will, therefore, be to decide, whether the Prisoner, when he did the act, was under the uncontrollable dominion of insanity, and was impelled to it by a *morbid delusion*; or whether it was the act of a man, who, though occasionally mad, or even at the time not per-

fectly collected, was yet not actuated by the disease, but by the suggestion of a wicked and malignant disposition.

I admit therefore, freely, that if, after you have heard the evidence which I hasten to lay before you, of the state of the Prisoner's mind, and close up to the very time of this catastrophe, you shall still not feel yourselves clearly justified in negating the wicked motives imputed by this Indictment, I shall leave you in the hands of the Learned Judges to declare to you the law of the land, and shall not seek to place society in a state of uncertainty by any appeal addressed only to your compassion: I am appointed by the Court to claim for the Prisoner the full protection of the law, but not to misrepresent it in his protection.

Gentlemen, the facts of this melancholy case lie within a narrow compass.

The unfortunate person before you was a soldier. He became so, I believe, in the year 1793—and is now about twenty-nine years of age. He served in Flanders under the Duke of York, as appears by His Royal Highness's evidence: and being a most approved soldier, he was one of those singled out as an orderly man to attend upon the person of the Commander-in-Chief. You have been witnesses, Gentlemen, to the calmness with which the Prisoner has sitten in his place during the trial.—There was but one exception to it.—You saw the emotion which overpowered him when the illustrious person now in Court, took his seat upon the Bench. Can you then believe, from

the evidence, for I do not ask you to judge as physiognomists, or to give the rein to compassionate fancy; but can there be any doubt that it was the generous emotion of the mind, on seeing the Prince, under whom he had served with so much bravery and honour? Every man certainly must judge for himself:—I am Counsel, not a witness, in the cause; but it is a most striking circumstance, when you find from the Crown's evidence, that when he was dragged through the orchestra under the stage, and charged with an act for which he considered his life as forfeited, he addressed the Duke of York, with the same enthusiasm which has marked the demeanour I am adverting to:—Mr. Richardson, who showed no disposition in his evidence to help the Prisoner, but who spoke with the calmness and circumspection of truth, and who had no idea that the person he was examining was a lunatic, has given you the account of the burst of affection on his first seeing the Duke of York, against whose father and sovereign he was supposed to have had the consciousness of treason.—The King himself, whom he was supposed to have so malignantly attacked, never had a more gallant, loyal, or suffering soldier. His gallantry and loyalty will be proved; his sufferings speak for themselves.

About five miles from Lisle, upon the attack made on the British army, this unfortunate soldier was in the fifteenth light dragoons, in the thickest of the ranks, exposing his life for his Prince, whom he is supposed to-day to have sought to murder:—the first wound he received is most materially connected with the subject

we are considering ; you may see the effect of it now.* The point of a sword was impelled against him with all the force of a man urging his horse in battle. When the Court put the Prisoner under my protection, I thought it my duty to bring Mr. Cline to inspect him in Newgate ; and it will appear by the evidence of that excellent and conscientious person, who is known to be one of the first anatomists in the world, that from this wound one of two things must have happened : either, that by the immediate operation of surgery the displaced part of the skull must have been taken away, or been forced inward on the brain. The second stroke also, speaks for itself : you may now see its effects.--(*Here Mr. Erskine touched the head of the Prisoner.*) He was cut across all the nerves which give sensibility and animation to the body, and his head hung down almost dissevered, until by the act of surgery it was placed in the position you now see it ; but thus, almost destroyed, he still recollected his duty, and continued to maintain the glory of his country, when a sword divided the membrane of his neck where it terminates in the head ; yet he still kept his place, though his helmet had been thrown off by the blow which I secondly described, when by another sword he was cut into the very brain—you may now see its membrane uncovered. Mr. Cline will tell you that he examined these wounds, and he can better describe them ; I have myself seen them, but am no surgeon : from his evidence you will have to consider

* Mr. Erskine put his hand to the Prisoner's head, who stood by him at the Bar of the Court.

their consequences. It may be said that many soldiers receive grievous wounds without their producing insanity. So they may undoubtedly; but we are here upon *the fact*. There was a discussion the other day, on whether a man, who had been seemingly hurt by a fall beyond remedy, could get up and walk: the people around said it was impossible; but he did get up and walk, and so there was an end to the impossibility. The effects of the Prisoner's wounds were known by the *immediate* event of insanity, and Mr. Cline will tell you that it would have been strange indeed if any other event had followed. We are not here upon a case of insanity arising from the spiritual part of man, as it may be affected by hereditary taint—by intemperance, or by violent passions, the operations of which are various and uncertain; but we have to deal with a species of insanity more resembling what has been described as ideocy, proceeding from original mal-organization. *There* the disease is, from its very nature, *incurable*; and so where a man (*like the Prisoner*) has become insane from *violence to the brain, which permanently affects its structure*, however such a man may appear occasionally to others, his disease is *immovable*; and if the Prisoner, therefore, were to live a thousand years, he *never* could recover from the consequence of that day.

But this is not all. Another blow was still aimed at him, which he held up his arm to avoid, when his hand was cut into the bone. It is an afflicting subject, Gentlemen, and better to be spoken of by those who understand it; and, to end all further description, he

was then thrust almost through and through the body with a bayonet, and left in a ditch amongst the slain.

He was afterwards carried to an hospital, where he was known by his tongue to one of his countrymen, who will be examined as a witness, who found him, not merely as a wounded soldier, deprived of the powers of his body, but bereft of his senses for ever.

He was affected, from the very beginning, with that species of madness, which, from violent agitation, fills the mind with the most inconceivable imaginations, wholly unfitting it for all dealing with human affairs, according to the sober estimate and standard of reason. He imagined that he had constant intercourse with the Almighty Author of all things; that the world was coming to a conclusion; and that, like our blessed Saviour, he was to sacrifice himself for its salvation; and so obstinately did this morbid image continue, that you will be convinced he went to the theatre to perform, as he imagined, that blessed sacrifice; and, because he would not be guilty of suicide, though called upon by the imperious voice of Heaven, he wished that by the appearance of crime his life might be taken away from him by others. This bewildered, extravagant species of madness appeared immediately after his wounds on his first entering the hospital, and on the very same account he was discharged from the army on his return to England, which the Attorney-General very honourably and candidly seemed to intimate.

To proceed with the proofs of his insanity *down to the very period of his supposed guilt*. This unfortunate

man before you, is the father of an infant of eight months; and I have no doubt, that if the boy had been brought into Court—(*but this is a grave place for the consideration of justice, and not a theatre for stage effect*)—I say, I have no doubt whatever, that if this poor infant had been brought into Court, you would have seen the unhappy father wrung with all the emotions of parental affection: yet, upon the Tuesday preceding the Thursday when he went to the playhouse, you will find his disease still urging him forward, with the impression *that the time was come*, when he must be destroyed for the benefit of mankind; and in the confusion, or rather *delirium* of this wild conception, he came to the bed of the mother, who had this infant in her arms, and endeavoured to dash out its brains against the wall. The family was alarmed—and the neighbours being called in, the child was, with difficulty, rescued from the unhappy parent, who, in his madness, would have destroyed it.

Now let me, for a moment, suppose that he had succeeded in the accomplishment of his insane purpose; and the question had been, whether he was guilty of murder. Surely the affection for this infant, up to the very moment of his distracted violence, would have been conclusive in his favour: but not more so than his loyalty to the King, and his attachment to the Duke of York, as applicable to the case before us; yet at that very period, even of extreme distraction, he conversed as rationally on all other subjects, as he did to the Duke of York at the theatre. The Prisoner knew perfectly that he was the husband of the woman,

and the father of the child ;—the tears of affection ran down his face at the very moment that he was about to accomplish its destruction ; but during the whole of this scene of horror, he was not at all deprived of memory, in the Attorney-General's sense of the expression : he could have communicated, at that moment, every circumstance of his past life, and every thing connected with his present condition, *except only the quality of the act he was meditating*. In *that*, he was under the over-ruling dominion of a morbid imagination, and conceived that he was acting against the dictates of nature, in obedience to the superior commands of Heaven, which had told him, that the moment he was dead, and the infant with him, all nature was to be changed, and all mankind were to be redeemed by his dissolution. There was not an idea in his mind, from the beginning to the end, of the destruction of the King ; on the contrary, he always maintained his loyalty—lamented that he could not go again to fight his battles in the field—and it will be proved, that only a few days before the period in question, being present when a song was sung, indecent, as it regarded the person and condition of His Majesty, he left the room with loud expressions of indignation, and immediately sung, God save the King, with all the enthusiasm of an old soldier, who had bled in the service of his country.

I confess to you, Gentlemen, that this last circumstance, which may, to some, appear insignificant, is, in my mind, most momentous testimony ; because, if this man had been in the habit of associating with persons

inimical to the government of our country, so that mischief might have been fairly argued to have mixed itself with madness (which, by the bye, it frequently does); if it could in any way have been collected, that from his disorder, more easily inflamed and worked upon, he had been led away by disaffected persons, to become the instrument of wickedness; if it could have been established that such had been his companions and his habits, I should have been ashamed to lift up my voice in his defence. I should have felt, that, however his mind might have been weak and disordered, yet if his understanding sufficiently existed, to be methodically acted upon as an instrument of malice, I could not have asked for an acquittal: but you find, on the contrary, in the case before you, that, notwithstanding the opportunity which the Crown has had, and which, upon all such occasions, it justly employs to detect treason, either against the person of the King, or against his government; *not one witness* has been able to fix upon the Prisoner before you, any one companion, of even a doubtful description, or any one expression from which disloyalty could be inferred; while the whole history of his life repels the imputation. His courage in defence of the King and his dominions, and his affection for his son, in such unanswerable evidence, all speak aloud against the presumption that he went to the theatre with a mischievous intention.

To recur again to the evidence of Mr. Richardson, who delivered most honourable and impartial testimony: I certainly am obliged to admit, that what a

prisoner says for himself, when coupled at the very time with an overt act of wickedness, is no evidence whatever to alter the obvious quality of the act he has committed.—If, for instance, I, who am now addressing you, had fired the same pistol towards the box of the King—and, having been dragged under the orchestra and secured for criminal justice, I had said, that I had no intention to kill the King, but was weary of my life, and meant to be condemned as guilty; would any man who was not himself insane consider that as a defence? Certainly not; because it would be without the whole foundation of the Prisoner's previous condition; part of which it is even difficult to apply closely and directly by strict evidence, without taking his undoubted insanity into consideration: because it is his unquestionable insanity which alone stamps the effusions of his mind with sincerity and truth.

The idea which had impressed itself, but in most confused images, upon this unfortunate man, was, *that he must be destroyed, but ought not to destroy himself*. He once had the idea of firing over the King's carriage in the street; but then he imagined he should be immediately killed, which was not the mode of propitiation for the world—and as our Saviour before his passion, had gone into the garden to pray, this fallen and afflicted being, after he had taken the infant out of bed to destroy it, returned also to the garden, saying, as he afterwards said to the Duke of York, “that all was “not over—that a great work was to be finished:”—and there he remained in prayer, the victim of the same melancholy visitation.

Gentlemen, these are the facts, freed from even the possibility of artifice or disguise ; because the testimony to support them will be beyond all doubt ; and in contemplating the law of the country, and the precedents of its justice, to which they must be applied, I find nothing to challenge or question—I approve of them throughout—I subscribe to all that is written by Lord Hale—I agree with all the authorities, cited by the Attorney-General, from Lord Coke ; but above all, I do most cordially agree in the instance of convictions by which he illustrated them in his able address. I have now lying before me the case of Earl Ferrers : unquestionably there could not be a shadow of doubt, and none appears to have been entertained, of his guilt. —I wish, indeed, nothing more than to contrast the two cases ; and so far am I from disputing either the principle of that condemnation, or the evidence that was the foundation of it, that I invite you to examine whether any two instances in the whole body of the criminal law, are more diametrically opposite to each other, than the case of Earl Ferrers, and that now before you. Lord Ferrers was divorced from his wife by act of Parliament ; and a person of the name of Johnson, who had been his steward, had taken part with the lady in that proceeding, and had conducted the business in carrying the act through the two Houses. Lord Ferrers consequently wished to turn him out of a farm which he occupied under him ; but his estate being in trust, Johnson was supported by the trustees in his possession : there were, also, some differences respecting coal-mines ; and in consequence of both transac-

tions, Lord Ferrers took up the most violent resentment against him. Let me here observe, Gentlemen, that this was not a resentment founded upon any *illusion*; not a resentment forced upon a distempered mind by fallacious images, but depending upon *actual circumstances and real facts*; and acting like any other man under the influence of malignant passions, he repeatedly declared that he would be revenged on Mr. Johnson, particularly for the part he had taken in depriving him of a contract respecting the mines.

Now suppose Lord Ferrers could have shewed that no difference with Mr. Johnson had ever existed regarding his wife at all—that Mr. Johnson had never been his steward—and that he had only, from delusion, believed so when his situation in life was quite different. Suppose, further, that an *illusive imagination* had alone suggested to him that he had been thwarted by Johnson in his contract for these coal-mines, there never having been any contract at all for coal-mines; in short, that the whole basis of his enmity was without any foundation in nature, and had been shown to have been a *morbid image* imperiously fastened upon his mind.—Such a case as that would have exhibited a character of insanity in Lord Ferrers, extremely different from that in which it was presented by the evidence to HIS PEERS. Before THEM, he only appeared as a man of turbulent passions; whose mind was disturbed by no fallacious images of things without existence; whose quarrel with Johnson was founded *upon no illusions*, but upon existing facts; and whose resentment proceeded to the fatal consummation with all the ordinary

indications of mischief and malice ; and who conducted his own defence with the greatest dexterity and skill. WHO THEN COULD DOUBT THAT LORD FERRERS WAS A MURDERER? When the act was done, he said, " I am " glad I have done it. He was a villain, and I am " revenged ;" but when he afterwards saw that the wound was probably mortal, and that it involved consequences fatal to himself, he desired the surgeon to take all possible care of his patient—and, conscious of his crime, kept at bay the men who came to arrest him ; showing, from the beginning to the end, nothing that does not generally accompany the crime for which he was condemned. He was proved, to be sure, to be a man subject to unreasonable prejudices, addicted to absurd practices, and agitated by violent passions ; but the act was not done under the dominion of uncontrollable disease ; and whether the mischief and malice were substantive, or marked in the mind of a man whose passions bordered upon, or even amounted to insanity, it did not convince the Lords, that, under all the circumstances of the case, he was not a fit object of criminal justice.

In the same manner, Arnold, who shot at Lord Onslow, and who was tried at Kingston soon after the Black Act passed on the accession of George I. Lord Onslow having been very vigilant as a magistrate in suppressing clubs, which were supposed to have been set on foot to disturb the new government, Arnold had frequently been heard to declare, that Lord Onslow would ruin his country ; and although he appeared, from the evidence, to be a man of most wild and

turbulent manners, yet the people round Guildford, who knew him, did not, in general, consider him to be insane.—His Counsel could not show, that any morbid *delusion* had ever overshadowed his understanding.—They could not show, *as I shall*, that just before he shot at Lord Onslow, he had endeavoured to destroy his own beloved child. It was a case of *human resentment*.

I might instance, also, the case of Oliver, who was indicted for the murder of Mr. Wood, a potter, in Staffordshire. Mr. Wood had refused his daughter to this man in marriage. My friend Mr. Milles was Counsel for him at the assizes. He had been employed as a surgeon and apothecary by the father, who forbid him his house, and desired him to bring in his bill for payment; when, in the agony of disappointment, and brooding over the injury he had suffered, on his being admitted to Mr. Wood to receive payment, he shot him upon the spot. The trial occupied great part of the day; yet, for my own part, I cannot conceive that there was any thing in the case for a Jury to deliberate on.—He was a man acting upon *existing facts*, and upon *human resentments* connected with them. He was at the very time carrying on his business, which required learning and reflection, and, indeed, a reach of mind beyond the ordinary standard, being trusted by all who knew him, as a practiser in medicine. Neither did he go to Mr. Wood's under the influence of *illusion*; but he went to destroy the life of a man who was placed exactly in the circumstances which the mind of the criminal represented him. He went to execute ven-

geance on him for refusing his daughter. In such a case there might, no doubt, be passion approaching to frenzy ; but there wanted that characteristic of madness to emancipate him from criminal justice.

There was another instance of this description in the case of a most unhappy woman, who was tried in Essex for the murder of Mr. Errington, who had seduced and abandoned her and the children she had borne to him. It must be a consolation to those who prosecuted her, that she was acquitted, as she is at this time in a most undoubted and deplorable state of insanity ; but I confess, if I had been upon the Jury who tried her, I should have entertained great doubts and difficulties : for although the unhappy woman had before exhibited strong marks of insanity arising from grief and disappointment ; yet she acted upon *facts and circumstances*, which had an *existence*, and which were calculated, upon the ordinary principles of human action, to produce the most violent resentment. Mr. Errington having just cast her off, and married another woman, or taken her under his protection, her jealousy was excited to such a pitch as occasionally to overpower her understanding ; but, when she went to Mr. Errington's house, where she shot him, she went with the express and deliberate purpose of shooting him. That fact was unquestionable ; she went there with a resentment long rankling in her bosom, bottomed on an existing foundation : she did not act under a *delusion*, *that he had deserted her* when he had not, but took revenge upon him for an actual desertion ; but still the Jury, in the humane consideration of her sufferings, pro-

nounced the insanity to be predominant over resentment, and they acquitted her.

But let me suppose (which would liken it to the case before us), that she had never cohabited with Mr. Errington ; that she never had had children by him ; and, consequently, that he neither had, nor could possibly, have deserted or injured her.—Let me suppose, in short, that she had never seen him in her life, but that her resentment had been founded on the morbid delusion that Mr. Errington, who had never seen her, had been the author of all her wrongs and sorrows ; and that, under that *diseased* impression, she had shot him. If that had been the case, Gentlemen, she would have been acquitted upon the opening, and no Judge would have sat to try such a cause: the *act itself* would have been decisively characteristic of madness, because, being founded upon nothing existing, it could not have proceeded from malice, which the law requires to be charged and proved, in every case of murder, as the foundation of a conviction.

Let us now recur to the cause we are engaged in, and examine it upon those principles by which I am ready to stand or fall, in the judgment of the Court.

You have a man before you who will appear, upon the evidence, to have received those almost deadly wounds which I described to you, producing the immediate and immoveable effects which the eminent surgeon, whose name I have mentioned, will prove that they could not but have produced ; it will appear that from that period he was visited with the severest paroxysms of madness, and was repeatedly confined

with all the coercion which it is necessary to practise upon lunatics ; yet, what is quite decisive against the imputation of treason against the person of the King, his loyalty never forsook him.—Sane or insane, it was his very characteristic to love his sovereign and his country, although the delusions which distracted him were sometimes, *in other respects*, as contradictory as they were violent.

Of this inconsistency there was a most striking instance on only the Tuesday before the Thursday in question, when it will be proved, that he went to see one Truelet, who had been committed by the Duke of Portland as a lunatic. This man had taken up an idea that our Saviour's second advent, and the dissolution of all human things, were at hand ; and conversed in this strain of madness : this mixing itself with the insane delusion of the Prisoner, he immediately broke out upon the subject of his own propitiation and sacrifice for mankind, although only the day before he had exclaimed, that the Virgin Mary was a whore ; that Christ was a bastard ; that God was a thief ; and that he and this Truelet were to live with him at White Conduit House, and there to be enthroned together. His mind, in short, was overpowered and overwhelmed with distraction.

The charge against the Prisoner is the overt act of compassing the death of the King, in firing a pistol at His Majesty—an act which only differs from murder inasmuch as the bare compassing is equal to the accomplishment of the malignant purpose ; and it will be *your* office, under the advice of the Judge, to decide

by your verdict to which of the two impulses of the mind you refer the act in question : you will have to decide, whether you attribute it wholly to mischief and malice, or wholly to insanity, or to the one mixing itself with the other. If you find it attributable to mischief and malice *only*, LET THE MAN DIE. The law demands his death for the public safety.—If you consider it as conscious malice and mischief mixing itself with insanity, I leave him in the hands of the Court, to say how he is to be dealt with ; it is a question too difficult for me.—I do not stand here to disturb the order of society, or to bring confusion upon my country ; but, if you find that the act was committed wholly under the dominion of insanity ; if you are satisfied that he went to the theatre contemplating his own destruction only ; and that, when he fired the pistol, he did not *maliciously* aim at the person of the King—you will then be bound, even upon the principle which the Attorney-General himself humanely and honourably stated to you, to acquit this most unhappy Prisoner.

If, in bringing these considerations hereafter to the standard of the evidence, any doubts should occur to you on the subject, the question for your decision will then be, which of the two alternatives is the most probable—a duty which you will perform by the exercise of that reason of which, for wise purposes, it has pleased God to deprive the unfortunate man whom you are trying ; your sound understandings will easily enable you to distinguish *infirmities*, which are *misfortunes*, from *motives*, which are crimes. Before the day ends the evidence will be decisive upon this subject.

There, is, however, another consideration which I ought distinctly to present to you ; because I think that more turns upon it than any other view of the subject : namely, whether the Prisoner's defence can be impeached for artifice or fraud ; because I admit, that if, at the moment when he was apprehended, there can be fairly imputed to him any pretence or counterfeit of insanity, it would taint the whole case, and leave him without protection ; but for such a suspicion there is not even a shadow of foundation.—It is repelled by the whole history and character of his disease, as well as of his life, independent of it. If you were trying a man under the Black Act, for shooting at another, and there was a doubt upon the question of malice ; would it not be important, or rather decisive evidence, that the Prisoner had no resentment against the Prosecutor—but that, on the contrary, he was a man whom he had always loved and served ? Now the Prisoner was maimed, cut down, and destroyed, in the service of the King.

Gentlemen, another reflection presses very strongly on my mind, which I find it difficult to suppress. In every state there are political differences and parties, and individuals disaffected to the system of government under which they live as subjects. There are not many such, I trust, in this country ; but whether there are many or any of such persons, there is one circumstance which has peculiarly distinguished His Majesty's life and reign, and which is in itself as a host in the Prisoner's defence :—since, amidst all the treasons and all the seditions which have been charged on reformers

of government as conspiracies to disturb it, no hand or voice has been lifted up against the person of the King; there have, indeed, been unhappy lunatics who from ideas too often mixing themselves with insanity, have intruded themselves into the palace—but no malicious attack has ever been made upon the King, to be settled by a trial: His Majesty's character and conduct have been a safer shield than guards or than laws.—Gentlemen, I wish to continue to that sacred life that best of all securities; I seek to continue it under that protection where it has been so long protected.—We are not to do evil that good may come of it; we are not to stretch the laws to hedge round the life of the King with a greater security than that which the Divine Providence has so happily realized.

Perhaps there is no principle of religion more strongly inculcated by the sacred Scriptures than by that beautiful and encouraging lesson of our Saviour himself upon confidence in the divine protection: “Take no heed for your life, what ye shall eat, or what ye shall drink, or wherewithal ye shall be clothed; but seek ye first the kingdom of God, and all these things shall be added unto you.” By which it is undoubtedly not intended that we are to disregard the conservation of life, or to neglect the means necessary for its sustentation; nor that we are to be careless of whatever may contribute to our comfort and happiness—but that we should be contented to receive them as they are given to us, and not seek them in the violation of the rule and order appointed for the government of the world.—On this principle nothing can more tend

to the security of His Majesty and his government, than the scene which this day exhibits in the calm, humane, and impartial administration of justice;—and if, in my part of this solemn duty, I have in any manner trespassed upon the just security provided for the public happiness I wish to be corrected.—I declare to you, solemnly, that my only aim has been to secure for the Prisoner at the Bar, whose life and death are in the balance, that he should be judged rigidly by the evidence and the law.—I have made no appeal to your passions—you have no right to exercise them. This is not even a case in which, if the Prisoner be found guilty, the royal mercy should be counselled to interfere: he is either an accountable being, or not accountable; if he was *unconscious* of the mischief he was engaged in, the law is a corollary, and he is not guilty; but if, when the evidence closes, you think he was conscious, and maliciously meditated the treason he is charged with, it is impossible to conceive a crime more vile and detestable; and I should consider the King's life to be ill attended to, indeed, if not protected by the full vigour of the laws, which are watchful over the security of the meanest of his subjects. It is a most important consideration, both as it regards the Prisoner, and the community of which he is a member. —Gentlemen, I leave it with you.

S P E E C H

FOR

GEORGE STRATTON, HENRY BROOKE, CHARLES
FLOYER, AND GEORGE MACKAY, Esquires :

AS DELIVERED IN THE COURT OF KING'S BENCH, ON THE 5TH
DAY OF FEBRUARY, 1780.

THE following Speech was one of the earliest of Lord Erskine's appearances at the Bar, having been delivered in the Court of King's Bench on the 5th of February, 1780. It was not comprehended in the former volumes, because the subject did not range within the title of that collection.

Time now begins to cast into the shade a proceeding which occupied at the moment a great deal of public interest and attention, viz. the arrest and imprisonment of Lord Pigot, Governor of Madras, by the Majority of the Council of that settlement, in the year 1776.

On their recall to Europe by the Directors of the East India Company, a motion was made in the House of Commons, for their prosecution by the Attorney-General for a high misdemeanor.

Admiral Pigot, the brother of Lord Pigot, being at that time a member of the House, and a most amiable man, connected in political life with the Opposition party in Parliament, an extraordinary degree of acrimony arose upon the subject, and the House of Commons came to a resolution to prosecute Messrs. Stratton, and others, in the Court of King's Bench; and an Information was accordingly filed against them by the Attorney-General. They were defended by Mr.

Dunning, and the other leading advocates of that time, but were found guilty; and, on their being brought up to receive the judgment of the Court, Mr. Erskine, who was then only junior Counsel, made the following Speech in mitigation of their punishment.

The principle of the mitigation, as maintained by Mr. Erskine, may be thus shortly described. Lord Pigot, considering himself, as President of the Government of Madras, to be *an integral part of it, independent of the Council*, refused to put a question for decision by the Board, which the members of the Council contended it was his duty ministerially to have done; and he also unduly suspended two of them, to make a majority in favour of his proceedings. This act of Lord Pigot was held by the Majority of the Council to be a subversion and usurpation of the government, which they contended was vested in the President *and Council*, and not in the President *only*; and to vindicate the powers of the government, thus claimed to reside in them, they caused Lord Pigot to be arrested and suspended, and directed the act of the Majority of Council, which Lord Pigot refused to execute, to be carried into execution. It was, of course, admitted that this act was not legally justifiable; that the Defendants were properly convicted, and must therefore, receive *some* punishment from the Court; but it was contended in the following Speech, that the Court was bound to remember and respect the principles which governed our ancestors at the Revolution, and which had dictated so many acts of indemnity by Parliament, when persons, impelled by imminent necessity, had disobeyed the laws.

The Defendants were only fined one thousand pounds, without any sentence of imprisonment.

S P E E C H
FOR THE
COUNCIL OF MADRAS,
IN MITIGATION OF PUNISHMENT.

NEVER BEFORE PRINTED.

MY LORD,

I REALLY do not know how to ask, or even to expect, the attention of the Court ; I am sure it is no gratification to me, to try your Lordship's patience on a subject so completely exhausted ; I feel, besides, that the array of Counsel assembled on this occasion, gives an importance and solemnity to the conviction which it little deserves, and carries the air of a painful resistance of an unexpected punishment, which it would be a libel on the wisdom and justice of the Court to expect.

But in causes, that, from their public nature, have attracted the public notice, and in which public prejudices have been industriously propagated and inflamed, it is very natural for the objects of them to feel a pleasure in seeing their actions (if they will bear a naked inspection) repeatedly stripped of the disguise with which the arts of their enemies had covered them, and to expect their Counsel to be, as it were, the heralds of

their innocence, even after the minds of the Judges are convinced. They are apt, likewise, and with some reason, to think, that, in *this* stage of a prosecution, surplusage is less offensive, the degree of punishment not being reducible to a point like a legal justification, but subject to be softened and shaded away by the variety of views in which the same facts may be favourably and justly presented, both to the understanding and the heart. Such feelings, my Lord, which I more than guess are the feelings of my injured Clients, must be my apology for adding any thing to what my learned leaders have already, I think, unanswerably urged in their favour. It will be, however, unnecessary for me to fatigue your Lordship with a minute recapitulation of the facts; I shall confine myself to the prominent features of the cause.

The Defendants are convicted of having assumed to themselves the power of the Government of Madras, and with having assaulted and imprisoned Lord Pigot. I say, they are convicted of *that*, because, although I am aware that the general verdict of Guilty includes, likewise, the truth of the first count of the Information, which charges the obstruction of Lord Pigot in carrying into execution the specific orders of the Company, yet it is impossible that the general verdict can at all embarrass the Court in pronouncing judgment, it being notorious, on the face of the evidence, first, that there were no direct or specific orders of the Company touching the points which occasioned either the original or final differences, the Rajah of Tanjore being, before the disputes arose, even beyond the letter of the instruc-

tions, restored and secured. Secondly, that the instructions, whatever they were, or however to be construed, were not given to the single construction of Lord Pigot, but to him *and his Council, like all the other general instructions of that Government.*

The Company inclined that the Rajah of Tanjore should be restored without infringing the rights of the Nabob of the Carnatic; but *how* such restoration and security of the Rajah could, or was to be effected without the infringement of those rights of the Nabob which were not to be violated, the Company did not leave to the single discretion of Lord Pigot, but to the determination of the ordinary powers of the Government of Fort Saint George, acting to the best of their understandings, responsible only, like all other magistrates and rulers, for the purity of their intentions.

It is not pretended that the Company's instructions directed the Rajah's security to be effected by the residence of a civil chief and council in Tanjore, or by any other civil establishment whatsoever: on the contrary, they disavow such appropriation of any part of the revenues of that country; *yet the resisting a civil establishment in the person of Lord Pigot's son-in-law, Mr. Russel, destined too by the Company for a different and incompatible service, is the specific obstruction which is the burden of the first count of the Information, and which is there attempted to be brought forward as an aggravation of the assumption of the general powers of the government; the obstruction of what was not only not ordered by the Company, but of*

which their orders implied, and in public council were admitted by one of Lord Pigot's adherents to imply, a *disapprobation and prohibition*.

The claims of Mr. Benfield, the subject of so much slanderous declamation without proof, or attempt of proof, and, what is more extraordinary, without even charge or accusation, are subject to the same observations: the orders to restore the Rajah to the possession of his country certainly did not express, and, if my judgment does not mislead me, could not imply, a restitution of the crops sown with the Prince's money, advanced to the inhabitants on the credit of the harvest, without which, universal famine would have ensued.

Had the Nabob, indeed, seized upon Tanjore in defiance of the Company, or even without its countenance and protection, he would, no doubt, have been a *malâ fide* possessor *quoad* all transactions concerning it with the Company's servants, whatever the justice of his title to it might in reality have been; and the Company's governors, in restoring the Rajah, paying no respect to such usurped possession, would have been justifiable in telling any European who had lent his money on the security of Tanjore—Sir, you have lent your money with your eyes open, to a person, whose title you knew not to be ratified by our approbation, and we cannot, therefore, consider either his claim or yours derived from it. But when the Nabob was put into possession by the Company's troops; when that possession, so obtained, was ratified in Europe, at least by the silence of the Company, no matter whether wisely or unwisely, justly or unjustly; and, after the Nabob

had been publicly congratulated upon such possession, by the King's plenipotentiary in the presence of all the neighbouring princes in India ; I confess I am at a loss to discover the *absurdity* (as it has been called) of the Nabob's pretensions ; and it must be remembered, that Mr. Benfield's derivative title was not the subject of dispute, but the title of the Nabob, his principal, from whence it was derived ; I am, therefore, supported by the report of the evidence, in saying, that it does not appear that the differences in Council arose, were continued, or brought to a crisis, on points where Lord Pigot had the Company's orders, either express or implied, to give any weight to his single opinion beyond the ordinary weight allotted to it by the constitution of the settlement, so as to justify the Court to consider the dissent of the Majority from *his measures*, to be either a criminal resistance of the President, or a disobedience of the Company's specific or general instructions.

Thus perishes the first count of the Information, even if it had been matter of charge ! But much remains behind. I know it is not enough that the Company's orders were not specific touching any of the points on which the differences arose, or that they were silent touching the property of the crop of Tanjore, or that the Nabob's claim to it had the semblance, or even the reality of justice ; I admit that it is not sufficient that the Defendants had the largest and most liberal discretion to exercise, if that discretion should appear to have been warped by bad, corrupt, or selfish motives ; I am aware, that it would be no

argument to say, that the acts charged upon them were done in resistance of Lord Pigot's illegal subversion, if it could be replied upon me, and that reply be supported by evidence, that such subversive acts of Lord Pigot, though neither justifiable nor legal, were in laudable opposition to their corrupt combinations. I freely admit that, if such a case were established against me, I should be obliged to abandon their defence; because I could apply none of the great principles of government to their protection; but, if they are clear of such imputations, then I *can* and *will* apply them *all*.

My Lord, of this bad intention there is no proof; no proof did I say? there is no charge!—I cannot reply to *slander* here. I will not debase the purity of the Court by fighting with the phantoms of prejudice and party, that are invisible to the sedate and sober eye of justice! If it had been a private cause, I would not have suffered my Clients, as far as my advice could have influenced, to have filed a single affidavit in support of that integrity which no complaint attached upon, and which no evidence had impeached; but, since they were bound like public victims, and cast into this furnace, we wished them to come forth pure and white; their innocence is, therefore, witnessed before your Lordships, and before the world, by their most solemn oaths; and it is surely no great boon, to ask credit for facts averred under the most sacred obligations of religion, and subject to criminal retribution *even here*, which you are bound, in the absence of proof, not only in duty

as Judges, but in charity as men, to believe without any oaths at all.

They have denied every corrupt motive and purpose, and every interest, directly or indirectly, with Mr. Benfield, or his claims.—But, says Mr. Rous, Benfield was a man of straw set up by *the Nabob*; be it so;—they have positively sworn that they had no interest, directly or indirectly, in the claims of *the Nabob himself*; no interest, directly or indirectly, in the property of the crop of Tanjore; no interest, directly or indirectly, beyond their duty, in the preference of Colonel Stuart's appointment to Mr. Russel's; nor any interest, direct or indirect, in any one act which is the subject of the prosecution, or which can, by the most collateral direction, be brought to bear upon it. Such are the affidavits; and, if they be defective, the defect is in us. They protested their innocence to us, their Counsel, and, telling us that there was no form in which language could convey asseverations of the purity of their motives, which they could not with a safe conscience subscribe to, they left it to us to frame them in terms to exclude all evasion.

But *circumstances* come in aid of their credit stronger than all oaths: men may swear falsely; men may be perjured, though a court of justice cannot presume it; but human nature cannot be perjured. They did not do the very thing, when they got the government, for which they are supposed to have usurped it. The history of the world does not afford an instance of men wading through guilt for a purpose which, when

within their grasp, they never seized or looked that way it lay.

When Mr. Benfield first laid his claims before the Board, Lord Pigot was absent in Tanjore, and Mr. Stratton was the legal governor during his absence, who might therefore have, in strict regularity, proceeded to the discussion of them; *but he referred them back to Lord Pigot, and postponed that discussion till his return*; when, on that discussion, they were declared valid by a legal majority, they neither forced them, nor threatened to force them on the Rajah, but only recommended it to him to do justice, leaving the time and the manner to himself; and, when at last they assumed the government, they did not change their tone with their power; the Rajah was left unrestrained as before, and, *at this hour*, the claims remain in the same situation in which they stood at the commencement of the disputes; neither the Nabob nor Mr. Benfield have derived the smallest advantage or support from the revolution in the government.

This puts an end to all discussion of Indian politics, which have been artfully introduced to puzzle and perplex the simple merits of this cause; I have no more to do with the first or second *Tanjore* war, than with the first or second *Carthaginian* war; I am sorry, however, my absence yesterday in the House of Commons prevented me from hearing the history of them, because, I am told, Mr. Rous spoke with great ability, and, I am convinced from what I know of his upright temper, with a zeal, that, for the moment,

justified what he said to his own bosom; but, if I am not misinformed, his zeal was his only brief; his imagination and resentment spurned the fetters both of fact and accusation, and his acquaintance with Indian affairs enabled him to give a variety to the cause, by plausible circumstances, beyond the reach of vulgar, ignorant malice to invent. It was calculated to do much mischief, for it was too long to be remembered, and too unintelligible to be refuted; yet I am contented to demand judgment on my Clients on Mr. Rous's terms: he tells your Lordship, that their intentions cannot be known till that time when the secrets of all human hearts shall be revealed, and then, in the same breath, he calls for a punishment as if they were revealed already. It is a new, ingenious, and summary mode of proceeding—*festinum remedium*, an assize of conscience.—If it should become the practice, which, from the weight of my Learned Friend, I have no manner of doubt it will, we shall hear such addresses to Juries in criminal courts as this:—Gentlemen, I am Counsel for the prosecution, and I must be candid enough to admit that the charge is not proved against the Defendants; there is certainly no legal evidence before you to entitle the Crown to your verdict; but as there is little reason to doubt that they are guilty, and as this deficiency in the evidence will probably be supplied at the day of judgment, you are well warranted in convicting them; and if, when the day of judgment comes, both you and I should turn out to be mistaken, they may move for a new trial.

This was the *general* argument of guilt; and, in the *particulars*, the reasoning was equally close and logical. How, says Mr. Rous, can it be believed that the Tanjore crop was not the corrupt foundation of the Defendants' conduct, when it appears from day to day, on the face of all the consultations, as the single object of dispute? That it was the object of dispute, I shall, for argument's sake, admit; but does Mr. Rous's conclusion follow from the admission of his premises? I will tell him why it does not; it is so very plain a reason, that, when he hears it, he will be astonished he did not discover it himself. Let me remind him, then, that all the inferences which connexions with the *Nabob* so amply supplied on the *one hand*, connexions with the *Rajah* would as amply have supplied on the *other*. If the Tanjore crop was the bone of contention, the *Rajah*, by *keeping it*, had surely the same opportunity of gratitude to his adherents, that the *Nabob* had to his by *snatching it from him*. The appointment of Mr. RUSSEL, to the residency of Tanjore—Mr. Russel, the friend, the confident, the son-in-law of Lord Pigot—was surely as good a butt for insinuation as *Colonel Stuart*, for the *whole Council*. The ball might, therefore, have been thrown back with redoubled violence; and I need not remind the Court, that the cause was conducted on our part by a gentleman whose powers of throwing it back it would be folly in me to speak of; but he nobly disdained it; he said he would not hire out his talents to scatter insinuation and abuse, when the administration of right and justice did not require

it; and his Clients, while they received the full, faithful, and energetic exercise of his great abilities, admired and applauded the delicate manly rectitude of his conduct; they felt that their cause derived a dignity and a security from the MAN, greater than the *advocate*, and even than *such* an advocate, could bestow.

I shall follow the example of Mr. Dunning. God forbid, my Lord, that I should insult the ashes of a brave man, who, in other respects, deserved well of his country; but let me remind the gentlemen on the other side, that the honour of the LIVING is as sacred a call on humanity and justice as the memory of the DEAD.

My Lord, the case, thus stripped of the false colours thrown upon it by party defamation, stands upon plain and simple principles, and I shall, therefore, discuss it in the same arrangement which your Lordships pursued in summing up the evidence to the Jury at the trial, only substituting alleviation for justification.

First, In whom did the ordinary powers of the government of Madras reside?

Secondly, What acts were done by Lord Pigot, subversive of that government?

Thirdly, What degree of criminality belongs to the confessedly illegal act of the Defendants, in assuming to themselves the whole powers of the government, *so subverted*? I say, *so subverted*; for I must keep it constantly in the eye of the Court, that the government was subverted, and was admitted by your Lord-

ship, at the trial, to have been subverted *by Lord Pigot*, before it was assumed by *the Majority of the Council*.

First, then, in whom did the government of Fort Saint George reside? And, in deciding this question, it will not be necessary to go, as some have done, into the general principles of government, or to compare the deputation of a company of merchants with great political governments, either ancient or modern. The East India Company, being incorporated by act of Parliament, derived an authority from their charter of incorporation, to constitute inferior governments, dependant on them for the purposes of managing their concerns in those distant parts:—had the Company, at the time the charter was granted, been such an immense and powerful body as it has since become from the trade and prosperity of the empire, it might have happened that the forms of these governments would have been accurately chalked out by Parliament, and been made part of the charter; in which case, the charter itself would have been the only place to have resorted to for the solution of any question respecting the powers of such governments, because the Company, by the general law of all corporations, could have made no by-laws, or standing orders, repugnant to it; but, on the other hand, the charter having left them at liberty, in this instance, and not having prescribed constitutions for their territorial governments in India, there can be no possible place to resort to for the solution of such questions, but to the commissioners of government granted by the Com-

pany ; their standing orders, which may be considered as fundamental constitutions ; and such explanatory instructions as they may, from time to time, have transmitted to their servants for the regulation of their conduct ;—by these, and these alone, must every dispute arising in the governments of India be determined, except such as fall within the cognizance of the act of the thirteenth of George the Third, for the regulation of the Company's affairs, as well in India as in Europe.

First, then, as to the commission of government, where the clause, on which they build the most, is made to run thus: “And to the end that he might
“be the better enabled to manage all the affairs of
“them the said Company, they appointed certain
“persons, therein named, to be of their Council at
“Fort Saint George.” These words would certainly imply the President to be an integral and substantive part distinct from the Council ; but, unfortunately, no such words are contained in the commission of government, which speaks a very different language, almost in itself conclusive against the proposition they wish to establish. The words are, “And to the end that the
“said George Lord Pigot might be the better enabled
“to manage all the affairs of us the said Company,
“we do constitute and ordain George Stratton, Esq.
“to be SECOND in our Council of Fort Saint George,
“to wit, TO BE NEXT IN THE COUNCIL after our said
“President George Lord Pigot.” It is impossible for the English language more plainly to mark out the President to be merely *the first in Council*, and not an

integral substantive part, *assisted by a Council* ; for, in such case, Mr. Stratton, the senior Councillor, would, it is apprehended, be called the *first in Council*, instead of the *second in Council*, to wit, next after the President ; and this clause in the commission, so explained, not only goes far by itself to resist the claim of independence in the President, but takes off from the ambiguity and uncertainty which would otherwise cloud the construction of the clause that follows, viz. “ And we do hereby give and grant unto our said “ President and Governor George Lord Pigot, *and to “ our Council afore-named*, or the major part of *them*, “ full power and authority, &c.” The President and Council being here named distinctly, the word *them*, without the foregoing clause, might seem to constitute the President an integral part, and separate from the Council ; but the President, having been before *constructively* named as the *first in Council* ; Mr. Stratton, though the senior Councillor, being expressly named the *second*, it is plain the word *them* signifies *the majority of such Council, of which the President is the first*, and who is named distinctly, not only by way of pre-eminence, but because all public bodies are called and described by their corporate names, and all their acts witnessed by their common seals, whatever their internal constitutions may be. No heads of corporations have by the common law of England, any negative on the proceedings of the other constituent parts, unless by express provision in their charters ; yet all their powers are given to them, and exercised by them, in their corporate names, which.

ever makes the head a party, although he may be dissentient from the act that receives authority from his name.

The standing orders of the Company, published in 1687, and 1702, which may be considered as fundamental constitutions, are plain and unequivocal; they enjoin, "That all their affairs shall be transacted in COUNCIL, and ordered and managed as the MAJORITY OF THE COUNCIL shall determine, and not otherwise on any pretence whatsoever." And again, "That whatever is agreed on by the MAJORITY shall be the order by which each one is to act; and every individual person, *even the dissenters themselves*, are to perform their parts in the prosecution thereof."

The agreement of the Majority being denominated an ORDER, shows as clearly as language can do, that obedience is expected to their determination; and it is equally plain, that no constituent member of that government can frustrate or counteract such order, since each individual, *even the dissenters themselves*, are commanded to act in conformity to it, and to perform their parts in the prosecution thereof. In speaking to dispassionate men, it is almost needless to add any arguments to show that the President's claim to refuse to put a question, adopted by a Majority of Council, stands upon the very same grounds as his claim to a negative on their proceedings, and that, if the first be overturned, the second must fall along with it; for if he be not an integral part of the government, and his concurrence be consequently not necessary to constitute an act of it, then his office as President, *with respect to*

putting questions, must necessarily be only ministerial; and he cannot obstruct the proceedings by refusing to put them; for, if he could, his power would be equal in effect to that of an integral part; and it would be a strange solecism indeed, if, at the same time that all the affairs of the government were to be managed and ordered by the opinions of a Majority, the President could prevent such opinions from ever being collected; and, at the same time that their acts would bind him, could prevent such acts from ever taking place. But it is altogether unnecessary to explain, by argument and inference, that which the Company, who are certainly the best judges of their own meaning, have explained in absolute and unequivocal terms by their instructions sent by Mr. Whitehill to Madras, explanatory of the new commission, by which they expressly declare the government to be in the *major part of the Council*, giving the President, or the senior Councillor in his absence, a casting vote, and directing *that every question proposed in writing by any Member of Council, shall be put by the Governor, or, in his absence, by the senior member acting as President for the time being; and that every question, carried by a majority, shall be deemed the act of the President and Council.* Indeed, the uniform determinations of the Directors on every occasion where this question has been referred to them, have been in favour of the Majority of Council; even so late as the 21st of April, 1777, *subsequent to the disturbances at Madras*, it will be found upon their records to have been resolved by ballot, “*That the powers contended for and assumed*

“by Lord Pigot, are neither known in the constitution of the Company, nor authorized by charter, nor warranted by any orders or instructions of the Court of Directors.” It is clear, therefore, beyond all controversy, that the President and Council were, at all times, bound and concluded by the decision of the Majority, and that it was his duty to put every question proposed by any member of the Board.

Had these regulations been made part of the *new* commission, they might have been considered as a *new* establishment, and not as a recognition of the *former* government; and consequently such regulations subsequent to the disturbances, could be no protection for the Majority acting under the *former* commission; but the caution of the East India Company, to exclude the possibility of such a construction, is most striking and remarkable: sitting down to frame a new commission under the immediate pressure of the difficulties that had arisen from the equivocal expressions of the former; they, nevertheless, adopt and preserve the very same words in all the parts on which the dispute arose, the two commissions differing in nothing except in the special preamble restoring Lord Pigot; and the object of this caution is self-evident, because, if, instead of thus preserving the same form, and sending out collateral instructions to explain it, they had rendered the new commission more precise and unequivocal by *new modes of expression*, it would have carried the appearance of a *new* establishment of what the government should *in future be*, and not as a recognition and definition of what it *always had been*; but by thus

using the same form of commission, and accompanying it with explanatory regulations, they, beyond all dispute, pronounced the former commission always to have implied what they expressly declare the latter to be, as it is impossible to suppose that the Company would make use of the same form of words to express delegations of authority diametrically opposite to each other. But, taking it for argument's sake, to be a new establishment rather than a recognition, still it is a strong protection to the Defendants. If the question, indeed, was concerning the regularity of an act done by the Majority, without the President, coming before the Court by a person claiming a franchise under it, or in any other *civil* shape where the constitution of the government was in issue, my argument, I admit, would not hold; the Court would certainly, *in such case*, be obliged to confine itself strictly to the commission of government, and such explanatory constitutions as were precedent to the act, the regularity of which was the subject of discussion; but it is very different when men are prosecuted *criminally* for subverting a constitution, and abusing delegated authority: they are not to be punished, I trust, for the obscurity of their employers' commissions, if they have been fortunate enough, notwithstanding such obscurity, to construe them as they were intended by their authors: if their employers declare, even after an act done, *This is what we meant should be our government*, that ought to be sufficient to sanction previous acts that correspond with such declarations, more especially declarations made on the spur of the occasion which

such previous acts had produced; for otherwise this monstrous supposition must be admitted, viz. That the Company had enlarged the power of their servants, because they had, in defiance of their orders, assumed them when they had them not; whereas, the reasonable construction of the Company's subsequent proceeding, is this: *It is necessary that our Council, on the President's refusing to perform his duty, should have such powers of acting WITHOUT HIM, as they have assumed in the late emergency; the obscurity of our commissions and instructions has afforded a pretence of resistance, which has obliged our servants either to surrender the spirit of their trusts, or to violate the form; to prevent such disputes in future, we do that, HITHERTO UNKNOWN; we make a regular form of government, and, at the same time, prescribe a rule of action in case it should not act up to the end of its present institution, to prevent an exercise of discretion always, if possible, to be avoided in every government, but more especially in such as are subordinate.* Therefore, my Lord, whether the late instructions be considered as explanatory, or enacting, they ought to be a protection to the Defendants *in a criminal court*, unless when their employers are the prosecutors. Neither Parliament, nor the Crown, ought to interfere; but, as they have done it, no evidence ought to have convicted them of assuming the powers of government, and obstructing the Company's service, but the evidence of the Directors of that Company under whom they acted. They ought not to be judged by blind records and parchments, *whilst the authors of them are at hand to explain*

them. It is a shocking absurdity to see men convicted of abusing trusts, when the persons who gave them are neither prosecutors nor witnesses against them.

The ordinary powers of the government of Madras being thus proved to have resided in the Majority of the Council, it now only remains to show, by a short state of the evidence, the necessity which impelled the extraordinary, and otherwise unwarrantable exercise of such powers in suspending and imprisoning Lord Pigot; for they once more enter a protest against being thought to have assumed and exercised such power as incident to their commission, while the government subsisted. It is their business to show, that, as long as the government continued to subsist, they faithfully acted their parts in it; and that it was not till after a total subversion of it, by an arbitrary suspension of the governing powers, that they asserted their own rights, and restored the government by resuming them.

On the 8th of July, Lord Pigot refused, as President, *to put a question* to the Board (upon the regular motion of a member), for rescinding a resolution before entered into. This refusal left the Majority no choice between an absolute surrender of their trusts, and an exercise of them without his ministerial assistance; there was no other alternative *in the absence of a superior coercive authority, to compel him to a specific performance of his duty*; but they proceeded no farther than the necessity justified; they did not extend the irregularity (if any there was) beyond the political urgency of the occasion.—Although their

constitutional rights were infringed by the President's claim, they formed no plan for their general vindication; but contented themselves with declaring, on that particular occasion, that, as the government resided *in them*, the President ought not to refuse putting the question, and that the resolution ought to be rescinded.

When the President again refused to put the question in the month following, for taking into consideration the draughts of instruction to Colonel Stuart (which was the immediate cause of all the disturbances that followed), they again preserved the same moderation, and never dreamt of any farther vindication of their authority, thus usurped, than should become absolutely necessary for the performance of the trusts delegated to them by the Company, which they considered it to be treachery to desert. They lamented the necessity of departing even from form; and, therefore, although the President's resolution to emancipate himself from their constitutional controul, was avowed upon the public minutes of the consultations, they first adjourned without coming to any resolution at all, in hopes of obtaining formality and regularity to their proceedings, by the President's concurrence:—disappointed in that hope by his persevering to refuse, and driven to the necessity of either surrendering their legal authority, or of devising some other means of exercising it without his personal concurrence, *having (as before observed) no process to compel him to give it*, they passed a vote approving of the instructions, and wrote a letter to Colonel Harper, containing

orders to deliver the command to Colonel Stuart ; but they did not proceed to sign it at that consultation, still hoping, by an adjournment, to gain Lord Pigot's sanction to acts legal in all points by the constitution of the government, except perhaps, in wanting that *form* which it was his duty to give them.

The use which Lord Pigot made of this slowness of the Majority to vindicate the divided rights and spirit of the Government, by a departure from even its undecided forms, notwithstanding the political necessity which arose singly from his own illegal refusal, is very luckily recorded by one of his Lordship's particular friends in Council, and a party to the transaction, as it would have been, otherwise, too much to have expected full credit to it from the most impartial mind.

"It had been discussed," says Mr. Dalrymple, *"before the Council met, what measures could be taken to support the government established by the Company, in case the Majority should still persist in their resolution to come to no compromise or reference of the matter in question, to the decision of the Court of Directors, but to carry things to extremity. One mode occurred to Lord Pigot, viz. by putting Colonel Stuart in arrest if he obeyed an order without the Governor's concurrence. To this many objections arose. Colonel Stuart might contrive to receive the orders WITHOUT the garrison, and, consequently, by the new military regulations, not be liable to the Governor's arrest : if he WAS arrested, the Majority would, of course, refuse to issue a warrant for a*

" court-martial, and confusion and disgrace must be the
" consequence.

" The only expedient that occurred to any of us,
" was, to ground a charge in case of making their de-
" claration in the name of the Council, instead of the
" President and Council; but here an apprehension
" arose, that they would see this impropriety, and ex-
" press their order, not in the name of the Council, as
" they had hinted, but in the name of the President and
" Council, maintaining that the Majority constituted the
" efficient Board of President and Council. In this case
" we could devise no measure to be pursued consistent with
" the rules of the service; but Lord Pigot said there
" was no fear of this, as he insisted the Secretary would
" not dare to issue any order in his name when he for-
" bade it. It was impossible to know, whether Sir
" Robert Fletcher would attend, or not; it was ne-
" cessary to have every thing prepared, that nothing
" might be to be done in Council; the Company's
" orders required the charge to be in writing; THE
" GOVERNOR, THEREFORE, HAD IN HIS POCKET CHARGES
" PREPARED FOR EVERY PROBABLE CONTINGENCY,
" whether they began at the eldest or the youngest, and
" whether the form was an order from themselves, or an
" order to the Secretary; and whether Sir Robert Fletcher
" was present or not. It was agreed, that the first of us
" to whom the paper was presented for signing, should
" immediately hand it to the President, who was then to
" produce the charge; the standing orders directing
" that members, against whom a charge is made, should
" have no seat; the members charged were, of course,

“deprived of their votes. As our ideas went no farther than relieving the Governor from the compulsion the Majority wanted to lay him under, it was determined to suspend no more than the necessity of the circumstance required.”

With this snare laid for them during the interval of that adjournment, *which their moderation had led them to*, the Council met on the 22nd of August, and, after having recorded their dissent from the President's illegal claim, to a negative on their proceedings, by refusing to perform his part in the prosecution of them (though strictly enjoined thereto by the standing orders of the Company), and in which refusal he still obstinately persisted, they entered a minute, declaring it as their opinion, that the resolution of the Council should be carried into execution without further delay, and that the instructions to Colonel Stuart, and the letter to Colonel Harper should be signed by the Secretary by order of Council.

This minute was regularly signed by a majority, and the President having again positively refused his concurrence, they prepared a letter to Mr. Secretary Sullivan, approving of the instructions to Colonel Stuart, and the letter to Lieutenant-colonel Harper.

The letter thus written, *in the name of the Majority*, and under their most public and avowed auspices, it was the immediate purpose of *all of them* to have signed in pursuance of the minute they had just before delivered in, expressive of their authority to that purpose; but the President, according to the *ingenious* plan preconcerted during the adjournment,

snatched the paper from Mr. Brooke, after he and Mr. Stratton had signed it, before the rest of the Majority could put their names to it, and pulling a written accusation out of his pocket, charged them as being guilty of an act subversive of the government; put the question of suspension on both at once, and ordered the Secretary to take neither of their votes, which, according to Mr. Dalrymple's *economical* scheme of illegality, exactly got rid of the Majority, by his own (*the accuser's*) casting vote.

The weakness and absurdity of the *principle* (if it deserves the name) on which this suspension was founded, creates a difficulty in seriously exposing it by argument; yet as it produced all the consequences that followed, I cannot dismiss it without the following remarks :

First, It was a gross violation of the constitution of the government, even admitting Lord Pigot to have been that integral part of it, which he assumed to be, as the establishment of that claim could only have given him a negative on the proceedings of a Majority, but never could have enabled him to fabricate one so as to do positive acts without one; the sudden charge and suspension of Messrs. Stratton and Brooke, and breaking the Majority by putting the question on both at once, would, therefore, have been irregular, even supposing the concurrence of the Majority to the act which constituted the charge against them, to have been unknown to Lord Pigot, and the Minority who voted with him : but when their concurrence was perfectly known; when the Majority of the Board had

just before publicly delivered in a minute, expressive of their right to authorize the Secretary to sign the order, if the President refused to do it; when the order was avowedly drawn out in pursuance of that minute, which made the whole *one act*, and was in the regular course of signing by the Majority, who had just before declared their authority to sign it; the snatching the paper under such circumstances, while unfinished, and arraigning those who had already signed it under the auspices of the Majority, as being guilty of an act subversive of the government, lodged in that Majority, and turning it into a Minority by excluding the votes of the parties charged, was a trick upon the governing powers which they could neither have submitted to with honour to themselves, or duty to their employers.

Such a power, however, Lord Pigot assumed over the government of Fort Saint George, by converting an act of the Majority, rendered necessary by his refusal to do his duty, into a criminal charge against two members acting under their authority, and by a device too shallow to impose on the meanest understanding, cut them off from acting as part of that Majority, by which the powers of the government were subverted, and passed away from them while they were in the very act of saving them from subversion.

It is unnecessary to say, that they were neither called upon in duty, nor even authorized, had they been willing to attend the summons of a Board so constituted by the foulest usurpation; a Board at which they must either have sacrificed their consciences

and judgments, or become the vain opposers of measures destructive to the interests of their employers; they therefore assembled, and answered the illegal summons, by a public protest against the usurped authority by which it issued. To this Council, assembled for the single purpose of sending such protest, they did not, indeed, summon the subverters of the government against whom it was levelled; affairs were arrived at too dangerous a crisis to sacrifice substance to forms, which it was impossible should have been regarded. Lord Pigot and his associates, on receiving the protest against the proceedings of the 22d of August, completed the subversion of the constitution, by the suspension of the rest of the Majority of the Council, and ordered Sir Robert Fletcher, the Commander-in-chief, to be put under arrest, to be tried by a *court-martial* for asserting the rights of the *civil* government as a member of the Council. This is positively sworn to have been done by Lord Pigot before their assumption of the government. Here then was a crisis in which it was necessary to act with decision, and, in asserting their rights by civil authority, to save the impending consequences of tumult and blood.—The period of temporizing was past, and there was no doubt of what it was their duty to do. Charged with the powers of the government, they could not surrender them with honour, and it was impossible to maintain them with safety or effect, while their legal authority was treated as usurpation and rebellion. They, therefore, held a Council, and agreed that the fortress and garrison should be in their hands, and under their command,

as the legal representatives of the Company, and, as there was every thing to dread from the intemperance of Lord Pigot's disposition, they, at the same time, authorized Colonel Stuart to arrest his person if he thought it necessary to preserve the peace of the settlement; Colonel Stuart *did* think it necessary, and his person was accordingly arrested; but during his necessary confinement, he was treated with every mark of tenderness and respect.

Such, my Lord, is the case—and it is much to the honour of the Defendants, that not a single fact appeared, or was attempted to be made appear, at the trial, that did not stand avowed upon the face of their public proceedings; I say, literally none; for I will not wheel into Court that miserable postchaise, nor its flogged postillion, the only living birth of this mountain which has been two years in its labour; every thing, and the reason and motive of every thing appeared, and still appear, to speak and plead for themselves. No cabals;—no private meetings;—no coming prepared for all possible events;—no secret manufacture of charges;—no tricks to overcome majorities; but every thing fair, open, and manly, to be judged of by the justice of their employers, the equity of their country, and the candour and humanity of the civilized world. As long as the government subsisted, their parts appear to have been acted in it with regularity and fidelity, nor was it till after a total subversion of it, by the arbitrary suspension of the governing powers (*and in the absence of all superior visitation*), that they asserted their own rights, and restored the

government by reassuming them. The powers so assumed, appear to have been exercised with dignity and moderation ; the necessary restraint of Lord Pigot's person was not tainted with any unnecessary rigour, but alleviated (notwithstanding the dangerous folly of his friends) with every enlargement of intercourse, and every token of respect ; the most jealous disinterestedness was observed by Mr. Stratton in not receiving even the lawful profits of magistracy : and the temporary authority, thus exerted for the benefit of their employers, was resigned back into their hands with cheerfulness and submission ; resigned, not like rapacious usurpers with exhausted revenues, disordered dependencies, and distracted councils, but with such large investments, and such harmonious dispositions, as have been hitherto unknown in the Company's affairs in any settlement in the East.

Your Lordships are, therefore, to decide this day on a question never before decided, or even agitated in any English Court of Justice ; you are to decide upon the merits of A REVOLUTION—which, as all revolutions must be, was contrary to established law, and not legally to be justified. The only revolutions which have happened in this land, have been, when Heaven was the only Court of Appeal, because their authors had no human superiors ; and so rapidly has this little island branched itself out into a great empire, that I believe it has never occurred that any disorder in any of its foreign *civil* dependencies, has been the subject of judicial inquiry ; but, I apprehend that, since the empire has thus expanded itself, and established govern-

ments *at distances inaccessible to its own ordinary visitation and superintendence*. all such subordinate governments, all political emanations from them, must be regulated by the same spirit and principles which animate and direct the parent state. Human laws neither do nor can make provision for cases which suppose the governments they establish to fall off from the ends of their institutions; and, therefore, no such extraordinary emergencies, when *forms* can no longer operate, from the absence of a superior power to compel their operations, it strikes me to be the duty of the component parts of such governments, to take such steps as will best enable them to preserve the *spirit* of their trusts; in no event whatsoever to surrender them, or submit them to their subversion; and, by considering themselves as an epitome of the constitution of their country, to keep in mind the principles by which that constitution has been preserved, and on which it is established.

These are surely fair premises to argue from, when the question is not *technical justification*, but *palliation* and *excuse*. The Members of the Council in the Majority of which the efficient government of Madras resided, were certainly as deeply responsible to the India Company in conscience, and on every principle of society, for the preservation of *its* constitution, from an undue extension of Lord Pigot's power, as the other component parts of *this* government are answerable to the people of this country for keeping the King's prerogative within its legal limits; there can be no difference but that which I have stated, namely, that the

one is subordinate, and the other supreme. But as, in the total absence of the superior power, subordination to it can only operate by an appeal to it for the ratification or annulment of acts already done, and not for directions what to do (otherwise, on every emergency, government must entirely cease), I trust it is not a strained proposition, to assert, that there can be no better rule of action, when subordinate rulers must act somehow, owing to their distance from the fountain of authority, than the history of similar emergencies in the government of their country, of which they are a type and an emanation.

Now, my Lord, I believe there is no doctrine more exploded, or more repugnant to the spirit of the British government, because the Revolution is built upon its ruin, than that there must be an imminent political necessity, analogous to natural necessity, to justify the resistance of the other component parts of the government, if one steps out of its delegation, and subverts the constitution; I am not speaking of technical justification.—It would be nonsense to speak of law and a revolution in the same sentence.—But I say, the British constitution, which is a government of law, knows no greater state necessity than the inviolate preservation of the spirit of a public trust from subversion or encroachment, no matter whether the country would fall into anarchy or blood, if such subversion or encroachment were suffered to pass unresisted.—A good Whig would swoon to hear such a qualification of resistance, even of the resistance of an integral part of legislation, much less of a part merely

ministerial, which, in all governments, must be subordinate to the legislature, wherever it resides. Such a state necessity, analogous to natural necessity, may be necessary to call out a private man, but is not at all applicable to the powers of a government. The Defendants did not act as *private* men, but as *governing powers*; for, although they were not, technically speaking, the government, when not assembled by the President; yet they were in the spirit of law, and on every principle of human society, the rulers of the settlement.—The Information charges the act as done by them in the public capacity of Members of the Council, in the Majority of which the government did reside; and their act, must, therefore, be taken to be a public act, for the preservation of their delegated trusts, from subversion by Lord Pigot, which, on the true principle of British government, is sufficient to render resistance meritorious, though not legal.

Where was the imminent state necessity at the Revolution in this country? King James suspended and dispensed with the laws.—What laws?—Penal laws against both Papists and Protestant Dissenters. Would England have fallen into confusion and blood if the persecuted Papist had been suffered publicly to humbug himself with the mystery of transubstantiation, and the Independent to say his prayers without the mediation of a visible church?—Parliament, on the contrary, immediately after the Revolution, repealed many of those intolerant laws, with a preamble to the act that abolished them, almost copied verbatim from the preamble of the Proclamation by which the

King suspended them ; yet, that suspension (although King James was, I trust, something more of an integral part of this government than Lord Pigot was of that of Madras) most justly cost him the crown of these kingdoms. What was the principle of the Revolution ? I hope it is well known, understood, and revered by all good men. The principle was, that the trustees of the people were not to suffer an infringement of the constitution, *whether for good or for evil*. All tyrants are plausible and cunning enough to give their encroachments the show of public good.—Our ancestors were not to surrender the *spirit* of their trusts, though at the expense of the *form*, and though urged by no imminent state necessity to defend them ; no other, at least, than that which I call, and which the constitution has ever since called the first and most imminent of all state necessities, *the inviolate preservation of delegated trusts from usurpation and subversion*. This is the soul of the British government.—It is the very being of every human institution which deserves the name of government ;—without it, the most perfect model of society is a painful and laborious work, which a madman, or a fool, may, in a moment, kick down and destroy.

Now, why does not the principle apply HERE ? Why may not inferiors, in the absence of the superior, *justly*, though not legally, at all events without sanguinary punishment, do, by a *temporary act to be annulled, or ratified, by such superior*, that which the superior would do finally, where there is no appeal at all ? Will you punish men who were obliged from their

distance from the fountain of authority, to act for themselves, only for having, at all events, refused to surrender their trusts?—only for having saved the government, committed to their charge, from subversion?—only for having acted, as it was the chief glory of our ancestors to have acted? The similitude does not, to be sure, hold throughout; but all the difference is in *our* favour; *our* act was not peremptory and final, but temporary and submissive to annulment; nor is the President of a Council equal only to each other individual in it, with an office, merely ministerial, to be compared with the condensed executive majesty of this great kingly government, with a negative in legislation.

The Majority of the Council was the efficient government of Madras, or, in other words, the legislature of the settlement, whose decisions the Company directed should be the order by which each one was to act, without giving any negative in legislation to the President, whose office was consequently (as I have before said) ministerial. This ministerial office he not only refused to perform, but assumed to himself, in effect, the whole government by dissolving a Majority against him. Let me put this plain question to the Court.—Ought such arbitrary, illegal dissolution to have been submitted to?—Ought the Majority, which was, in fact, the whole government in substance, spirit, and effect, though not in regular form, to have suffered itself to be thus crumbled to pieces, and destroyed? Was there, in such a case, any safe medium between suffering both spirit and form to go out

together, and thus sacrificing the form to preserve the spirit? and could the powers of the government have been assumed or exercised without bloodshed, if Lord Pigot had been left at large? I appeal to your Lordships, whether human ingenuity could have devised a *middle road* in the absence of all superior controul? Ought they to have acquiesced, and waited for the sentence of the Directors, and, on his motion, played at shuttlecock with their trusts across the globe, by referring back questions to Europe, which they were sent out to Asia to decide? Where representatives *doubt* what are the wishes of their constituents, it may be proper to make such appeals; but, if they were subject to punishment for not consenting to them, whenever one of their body proposed them, government would be a mere mockery. It would be in the power of the President, whenever he pleased, to cripple all the proceedings of the Council. It puts me in mind of the embargo once laid upon corn by the Crown, during the recess of Parliament, which was said, in a great assembly, to be but forty days tyranny at the outside; and it equally reminds me of the celebrated constitutional reply which was made on that occasion, which it would be indelicate for me to cite here, but which, I trust, your Lordship has not forgotten.*

This would have been not only forty days tyranny at the outside, but four hundred days tyranny at the inside.—It would have been a base surrender of their

* Lord Mansfield's Speech in the House of Lords against the dispensing power.

trusts, and a cowardly compromising conduct unworthy of magistracy.

But the Defendants are, notwithstanding all this, CONVICTED; surely, then, either the Jury, or I, mistake. If what I have advanced be sound or reasonable in principle, the verdict must be unjust. By no means. All I have said is compatible with the verdict. Had I been on the Jury, I should have found them guilty; but, had I been in the House of Commons, I would have given my voice against the prosecution. CONVICTION! Good God! how could I doubt of conviction, when I know that our patriot ancestors, who assisted in bringing about the glorious Revolution, could not have stood justified in this Court, though King William sat on the throne, but must have stood self-convicted criminals without a plea to offer in their defence, had not Parliament protected them by acts of indemnity!

Nothing that I have said could have been uttered without folly to a *Jury*. It could not have been uttered with less folly to your Lordship, sitting in judgment, on this case, on a *special verdict*. They are not arguments of *law*; they are arguments of *state*, and the state ought to have heard them before it awarded the prosecution; but, having awarded it, *your Lordships now sit in their place to do justice*. If the law, indeed, had prescribed a *specific* punishment to the fact charged, the judgment of the law must have followed the conviction of the *fact*, and your Lordships could not have mitigated the sentence. They could only have sued to the state for indemnity.

It would in that case, have been the sentence of the law, not of the Judge. But it is not so here. A Judge, deciding on a misdemeanor, is bound in conscience, in the the silence of law, not to allot a punishment beyond his opinion, of what the law, in its distributive justice, would have specifically allotted.

My Lord, if these arguments, drawn from a reflection on the principles of society in general, and of our own government in particular, should, from their uncommonness in a Court of Justice, fail to make that immediate and decided impression, which their justice would otherwise insure to them, I beseech your Lordship to call to mind, that the Defendants who stand here for judgment, stand before you for acts done as the rulers of a valuable, immensely extended, and important country, so placed at the very extremity of the world, that the earth itself travels round her orbit in a shorter time than the Eastern deputy can hear the voice of the European superior; a country surrounded, not only with nations which policy, but which Nature, violated Nature! has made our enemies, and where government must, therefore, be always on the watch, and in full vigour, to maintain dominion over superior numbers by superior policy.—The conduct of men, in such situations, ought not surely to be measured on the narrow scale of municipal law.—*Their* acts must not be judged of like the acts of a little corporation within the reach of a mandamus, or of the executive strength of the state.—I cannot, indeed, help borrowing an expression from a most excellent and eloquent person, when the

conduct of one of our colony governments was, like this, rather hastily arraigned in Parliament. "I am "not ripe," said a Member of the House of Commons, "to pass sentence on the gravest public bodies, "intrusted with magistracies of great weight and "authority, and charged with the safety of their "fellow-citizens on the very same title that I am; I "really think, that for wise minds, this is not judi- "cious; for sober minds, not decent; for minds "tinctured with humanity, not mild and merciful." Who can refuse his assent to such admirable, manly sentiments?—What, indeed, can be so repugnant to humanity, sound policy, decency, or justice, as to punish public men, acting in extremities not provided for by positive institution, without a corrupt motive proved, or even charged upon them? I repeat the words again, that every man's conscience may *force* him to follow me, *without a corrupt motive proved or even charged upon them.*

Yet it has been said, that PUBLIC EXAMPLE ought to weigh heavily with the Court in pronouncing judgment.—I think so too.—It ought to weigh heavily indeed; but all its weight ought to be placed in the saving, not in the vindictive scale. PUBLIC EXAMPLE requires that men should be secure in the exercise of the great *public* duties they owe to magistracy, which are paramount to the obligations of obedience they owe to the laws as *private* men. PUBLIC EXAMPLE requires that no magistrate should be punished for an error in judgment, even in the common course of his duty, which he ought to know, and for which there is a

certain rule; much less for an act like this, in which he must either do wrong by seizing the trust of another, or do wrong by surrendering his own. — PUBLIC EXAMPLE requires that a magistrate should stand or fall by his HEART;—that is the only part of a magistrate vulnerable in law in every civilized country in the world. — WHO HAS WOUNDED THE DEFENDANTS THERE? Even in this fertile age of perjury, where oaths may be had cheap, and where false oaths might be safe from the distance of refutation, no one champion of falsehood has stood forth, but the whole evidence was read out of a book *printed by the Defendants themselves, for the inspection of all mankind.*

What, then, has produced this virulence of prosecution in a country so famed for the humanity of its inhabitants, and the mildness of its laws?—*The death of Lord Pigot during the revolution in the government?* Strange, that malice should conjure up so improbable an insinuation, as that the Defendants were interested in that unfortunate event; no event, indeed, could be to them more truly unfortunate. If Lord Pigot had lived to return to England, this prosecution had never been.—His guilt and his popularity, gained by other acts than these, would have been the best protection for THEIR friendless innocence.—Lord Pigot, besides many connexions in this country, had a brother, who has, and who deserves to have, many friends in it.—I can judge of the zeal of his friends, from the respect and friendship I feel for him myself; a zeal, which might have misled *me*, as it has many better and wiser than *me*, if my professional duty had not led me to an

early opportunity of correcting prejudice by truth.—Indeed, some of the darkest and most dangerous prejudices of men, arise from the most honourable principles of the mind.—When prejudices are caught up from bad passions, the worst of men feel intervals of remorse to soften and disperse them; but when they arise from a generous, though mistaken source, they are hugged closer to the bosom, and the kindest and most compassionate natures feel a pleasure in fostering a blind and unjust resentment.—This is the reason that the Defendants have not met with that protection from many, which their meritorious public conduct entitled them to, and which has given rise to a cabal against them so unworthy the legislature of an enlightened people, a cabal which would stand forth as a striking blot upon its justice, if it were not kept in countenance by a happy uniformity of proceeding, as this falling country can well witness.—I believe, indeed, this is the first instance of a criminal trial in England, canvassed for like an election, supported by defamation, and publicly persisted in, in the face of a Court of Justice, without the smallest shadow of evidence.—This deficiency has compelled the Counsel for the Crown to supply the baldness of the cause with the most foreign invective; foreign, not only in proof, but in accusation.—In justice to them, I use the word *compelled*, as, I believe, none of them would have been inclined, from what I know of their own manners and dispositions, to adopt such a conduct without a most imminent *Westminster-hall necessity*, viz. that of saying something in support of a cause, which nothing but

slander and falsehood could support. *Their* duty as *public* and *private* men, was, perhaps, as incompatible as the duty of my Clients; and they have chosen, like them, to fulfil the *public* one; and, indeed, nothing less than the great ability and eloquence (*I will not say the propriety*) with which that public duty was fulfilled at the trial, could have saved the prosecution from ridicule and contempt. As for us, I am sure we have lost nothing with the world, or with the Court, by our moderation; nor could the prejudices against us, even if the trial had not dispelled them, reach us within these venerable walls.—Nothing, unsupported by evidence, that has been said here, or any where, will have any other effect upon the Court, than to inspire it with more abundant caution in pronouncing judgment.—Judges in this country are not expected to shut themselves up from society; and, therefore, when a subject that is to pass in judgment before them, is of a public and popular nature, and base arts have been used to excite prejudices, it will only make wise and just magistrates (such as I know, and rejoice that I am addressing myself to) the more upon their guard, rigidly to confine all their views to the record of the charge which lies before them, and to the evidence by which it has been proved; and to be doubly jealous of every avenue by which human prejudices can force their way to mislead the soundest understandings, and to harden the most upright hearts.

The Court, by its judgment, only imposed a fine of One Thousand Pounds upon each of the Defendants; a sentence which, we believe, was considered at the time by the whole profession of the law, and by all others qualified to consider such a subject, as highly just and proper, under all the circumstances of the case. The accusation was weighty, but the Judges were bound, by their oaths, to weigh all the circumstances of mitigation, as they appeared from the facts in evidence, and from the pleadings of the Counsel at the Bar. They were not to pronounce a severe judgment because the House of Commons was the Prosecutor. Mr. Burke, however, who had taken a very warm, and, we have no doubt, an honest part, in the prosecution, took great offence at the lenient conclusion; and repeatedly animadverted upon it in the House of Commons. There can be no doubt of the high value of the privilege possessed by the Representatives of the People, to be public accusers; but for that very reason they can have no right to determine, or to interfere with the judgments of other tribunals, when they themselves are the prosecutors. If Judges, indeed, conduct themselves corruptly, or partially, upon a prosecution by the House of Commons, or upon any other judicial proceeding whatsoever, it is a high and valuable privilege of the People's Representatives in Parliament to proceed against the offenders by impeachment; but it is not the duty of any member of that high assembly, to disparage the decisions of the Judges, by invidious observations, without any public proceeding which may bring their merits, or demerits, into public examination. Such a course is injurious to those who have been the subjects of them; disrespectful to the magistrates who have pronounced them; and contrary to the spirit and character of the British Constitution.

MORTON AGAINST FENN.

SPEECH IN THE COURT OF KING'S BENCH AGAINST A NEW TRIAL.

P R E F A C E.

THE following Speech may appear, at first glance, to be scarcely worthy of a place in a collection of pleadings upon so many interesting subjects; but it will be found, on examination, to contain very important principles of law. The occasion of it was shortly this. A woman of the name of Morton, who was the Plaintiff, in a Cause tried before Lord Mansfield, at the sittings at Guildhall, in London, had hired herself to be Housekeeper to a Mr. Fenn, who was the Defendant, an old and infirm man. Mrs. Morton, the Plaintiff, was not a young woman, and had no great personal recommendations. The old gentleman, however, thought otherwise; and, to induce his housekeeper to cohabit with him, had promised to marry her; the breach of which promise was the foundation of an action to recover damages.

The Cause was conducted by Lord Erskine, who had not then been long at the Bar. There is no note of what passed at the Trial, nor is it material; except that, after the Plaintiff's case had been opened, and, after some cross-examination of the Witness who proved the promise, with a view to ridicule the person and manners of the Plaintiff, Mr. Wallace, then Attorney-General, and who was a very able *Nisi Prius* advocate, endeavoured, as the lawyers call it, without calling witnesses, to laugh the Cause out of Court, by representing, that neither of the parties to the contract had any loss from the

breach of it, as the Plaintiff was an ugly old woman, and the Defendant, who was then in Court, and whom he pointed out to the Jury to make the scene more ludicrous, was not a person, in the loss of whom, as A HUSBAND, there could be any claim to more than a *farthing* damages. The Jury, however, returned a verdict of TWO THOUSAND POUNDS; and, in the term which followed, a Rule having been obtained by the Attorney-General for setting aside the verdict, and for a new trial, on the ground that the damages were EXCESSIVE, the following very short Speech was made by Mr. Erskine, maintaining his Client's right to the whole money, and denying the jurisdiction of the Court, *in such a case*, to impeach the verdict of the Jury.

Perhaps, there is no subject more important in the whole volumes of the law, than that which regards the distinct jurisdictions of Judges and Juries in that mixed form of trial, which is the peculiar and the best feature in the British Constitution. The subject, as it applies to criminal cases, is treated of in every possible point of view in the Dean of St. Asaph's Case in the first volume of the former Collection; but it is most important, also (even as it regards *civil* cases), that the distinct offices of Judges and Juries should be thoroughly understood, and rigidly maintained. If in civil actions the Court had no jurisdiction to set aside verdicts, and to grant new trials, even in cases where the Jury may either have mistaken the law, or where they may have assessed damages by no means commensurate with the loss of property, or with the injury sustained by the party complaining; if, in cases where Juries may have assessed damages either manifestly and grossly excessive, or unjustly inadequate, the Court had no jurisdiction to send the case to another hearing for more mature consideration. Trial by Jury, the boast and glory of our country, would be as great a national evil, as it is now a benefit and a blessing; but if, on the other hand, re-

visions of verdicts were suffered to take place, unless in cases of *manifest* injustice; if new trials were to be awarded, because Judges might differ from Juries upon occasions where men of sense and justice might reasonably differ from one another, such a proceeding would be the substitution of judicial authority, in fixed magistrates, for the discretion lodged by the Constitution in the popular jurisdictions of the country. Every pleading, therefore, which accurately marks out, and firmly maintains, those salutary boundaries, *though already very well understood and ascertained*, is worthy of a faithful report. On the present occasion, the Court refused to set aside the verdict, upon the principles contained in the short Speech which follows.

MY LORD,

THE jurisdiction exercised by the Court in cases of excessive damages stands upon so sensible and so clear a principle, that the bare stating of it must, in itself, be an answer to the rule for a new trial which the Defendant has obtained.

In cases of pecuniary contracts, the damage is matter of *visible* and *certain* calculation; the Court can estimate it as well as the Jury; and though it never interferes, on account of those variations, which may be fairly supposed to have arisen from the different degrees of credit given to the evidence, yet where the Jury steps beyond every possible estimate of the injury arising from the contract broken, the Court must say that the verdict is wrong; because it is a subject upon which there can be no difference of judgment amongst reasonable men; the advantage of a pecuniary

contract, and, consequently, the loss following from the breach of it, being a matter of dry calculation. In such cases, therefore, the Court does not set up a jurisdiction over damages in violation, or controul, of the constitutional rights of Juries, but only prevents the operation of either a visible, certain, palpable mistake, or a wilful act of injustice:—this is the whole—and without such power in the Court, since attaints have gone into disuse, the Constitution would be wretchedly defective.

The same principles apply, likewise, to all actions of tort founded on injuries to property: the measure of damages in such actions being equally certain.—As much as the Plaintiff's property is diminished in value by the act of the Defendant, so much shall the Defendant pay; for he must place the Plaintiff in the same condition as if the wrong had not been committed:—in such discussions, there must be likewise, many shades of difference in the judgments of men respecting the loss and inconvenience suffered by acts injurious to property, and as far as these differences can have any reasonable operation, Juries have an uncontrolled jurisdiction; as the Court will never set aside their verdict for a difference which might fairly subsist upon the evidence between intelligent and unprejudiced men: but here, too, when they go beyond the *utmost limits of discreet judgment*, the Court interferes, because there is in all cases of injury to *property*, a *pecuniary* calculation to govern the jurisdiction it exercises; all attacks on property resolving themselves into pecuniary loss, pecuniary damages are easily adjusted.

But there is a catalogue of wrongs over which Juries, where neither favour nor corruption can be alleged against them, ought to have an uncontrolled dominion : not because the Court has not the same superintending jurisdiction in these as in other cases, but because it can rarely have any standard, by which to correct the error of the verdict.

There are other rights which society is instituted to protect as well as the right of property, which are much more valuable than property, and for the deprivation of which no adequate compensation in money can be made.—What Court, for instance, shall say in an action for slandering an honest and virtuous character, that a Jury has over-rated the wrong which honour and sensibility endure at the very shadow of reproach?—If a wife is seduced by the adulterer from her husband, or a daughter from the protection of her father, can the Court say this or that sum of money is too much for villany to pay, or for misery to receive? In neither of these instances can the Jury compel the Defendant to make an adequate atonement, for neither honour nor happiness can be estimated in gold ; and the law has only recourse to pecuniary compensation from the want of power to make the sufferer any other.

These principles apply, in a strong degree, to the case before the Court. It is, indeed, a suit for breach of a contract, but not of a *pecuniary* contract ;—injury to *property* is an ingredient—but not the *sole* ingredient of the action : there is much personal wrong : and of a sort that is irreparable : there is, upon the evidence reported by your Lordship, loss of health, loss of hap-

piness, loss of protection from relations and friends, loss of honour which had been before maintained (in itself the full measure of ruin to a woman); and, added to all these, there is loss of property in the disappointment of a permanent settlement for life:—and for all this, the Jury have given Two Thousand Pounds, not more than a year's interest of the Defendant's property.

I am, therefore, at a loss to discover any circumstance on the face of your Lordship's report, from which, alone, the Court must judge of the evidence, that can warrant a judgment that the Jury have done wrong; for, independent of their exclusive right to settle the degrees of credit due to the witnesses, what was there at the trial, or what is there *now*, to bring their credit into question? Their characters stood before the Jury, and stand before the Court, unimpeached; and Mr. Wallace's whole argument, if, indeed, jest is to be considered as reason, hangs upon the inadmissible supposition that the witnesses exaggerate the case; but the *Jury* have decided on their veracity; and, therefore, before the Court can grant a new trial, it must say, that the verdict is excessive and illegal *upon the facts as reported by your Lordship, taking them to be literally as they proceeded from the mouths of the witnesses.*—Upon this state of the case, and it is impossible to remove me from it, I think it is not very difficult to make up the Defendant's bill for Two Thousand Pounds.

The Plaintiff appears to be the daughter of a clergyman, and to have been bred up with the notions of a gentlewoman; she had been before respectably married, in which condition, and during her widowhood, she

had preserved her character, and had been protected and respected by her relations and friends. It is probable that her circumstances were very low, from the character in which she was introduced to the Defendant, who, being an old and infirm man, was desirous of some elderly person as a housekeeper; and no imputation can justly be cast upon the Plaintiff for consenting to such an introduction; for, by Mr. Wallace's favour, the Jury had a view of this Defendant, and the very sight of him rebutted every suspicion that could possibly fall upon a woman of any age, constitution, or complexion.—I am sure every body who was in Court must agree with me, that all the diseases catalogued in the dispensatory seemed to be running a race for his life, though the asthma appeared to have completely distanced his competitors, as the fellow was blowing like a smith's bellows the whole time of the trial.—His teeth being all gone, I shall say nothing of his gums; and, as to his shape, to be sure a bass-fiddle is perfect gentility compared with it. I was surprised, therefore, that Mr. Wallace should be the first to point out this mummy to the Jury, and to comment on his imperfections, because they proved to a demonstration, that the Plaintiff could have no other possible inducement or temptation to cohabit with him, but that express and solemn promise of marriage which was the foundation of the action, and the aggravation of the wrong.—But, besides such plain presumption, it is directly *in proof* that she never DID cohabit with him before, nor until under this express promise and condition; so that the whole argument is, that disease and infirmity are excuses for

villany, and extinction of vigour an apology for debauchery.—The age of the Plaintiff, who is a woman towards fifty, was another topic ; so that a crime is argued to be *less* in proportion as the temptation to commit it is *diminished*.

It would be in the Defendant's favour if the promise had been improvident and thoughtless; suddenly given, and as suddenly repented; but the very reverse is in evidence, as she lived with him on these terms for several months, and at the end of them, he repeated his promises, and expressed the fullest approbation of her conduct.—It is further in proof, that she fell into bad health on her discovering the imposition practised on her, and his disposition to abandon her.—He himself admitted her vexation on that account to be the cause of her illness, and his behaviour under that impression was base: having determined to get rid of her, he smuggled her out of his own house to her sister's, under pretence that change of air would recover her; and continued to amuse the poor creature with fresh promises and protestations, till, without provocation, and without notice or apology, he married another woman, young enough to be his daughter, and who, I hope, will manifest her affection by furnishing him with a pair of *horns*, sufficient to defend himself against the sheriff when he comes to levy the money upon this verdict.

By this marriage, the poor woman is abandoned to poverty and disgrace; cut off from the society of her relations and friends; and shut out from every prospect of a future settlement in life suitable to her education and her birth; for having neither beauty nor

youth to recommend her, she could have no pretensions but in that good conduct and discretion which, by trusting to the honour of the Defendant, she has forfeited and lost.

On all these circumstances, no doubt the Jury calculated the damages, and how can your Lordship unravel or impeach the calculation? They are not like the items in a tradesman's account, or the entries in a banker's book; it is,

For loss of character, so much;—

For loss of health, so much;—

For loss of the society and protection of relations and friends, so much;—

And for the loss of a settlement for life, so much.

How is the Court to audit this account, so as to say, that, in every possible state of it, the Jury has done wrong?—How, my Lord, are my observations, weak as they are as proceeding from me, but strong as supported by the subject, to be answered?—only by ridicule which the facts do not furnish, and at which even folly, when coupled with humanity or justice, cannot smile.—We are, besides, not in a theatre, but in a Court of Law; and when Judges are to draw grave conclusions from facts, which not being under re-examination, cannot be distorted by observation, they will hardly be turned aside from justice by a jest.

I, therefore, claim for the Plaintiff the damages which the Jury gave her under these directions from your Lordship, "*That they were so entirely within THEIR province, that you would not lead their judgments by a single observation.*"

The Rule for a new trial was DISCHARGED.

THE
CASE OF THE BISHOP OF BANGOR

AND OTHERS ;

INDICTED FOR A RIOT AND AN ASSAULT.

TRIED AT SHREWSBURY ASSIZES,

On the 26th of July, 1796.

THE exemplary morals and decorum which have so long, to the honour of this country, distinguished the high dignitaries of her national church, bestowed upon the trial of the Right Reverend Prelate, who was the principal object of it, an extraordinary degree of curiosity and interest. Indeed, from a perusal of the whole proceedings, we cannot help thinking, that the Prosecutor might perhaps have been influenced by the expectation that any compromise would have been preferred by the Defendant and his friends, to even a public discussion of such an extraordinary accusation as that of a riot and assault by an English Bishop, assisted by other clergymen of his diocese, within the very precincts of his own cathedral. The Reverend Prelate, however, was not to be intimidated.—He pleaded Not Guilty to the Indictment, and received the clear acquittal of a Jury of his countrymen.

The Indictment was preferred against the Lord Bishop of Bangor, the Rev. Dr. Owen, the Rev. John Roberts, the Rev. John Williams, and Thomas Jones, Gent.; and was prosecuted by Samuel Grindley, the Deputy Registrar of the Bishop's Consistorial Court.

The Indictment charged that Samuel Grindley, the Prosecutor, was Deputy Registrar of the Consistorial Court of the Bishopric of Bangor, and that being such, he had of right the occupation of the Registrar's office adjoining to the cathedral; that the Bishop and the other Defendants, intending to disturb the Prosecutor in the execution of his office, and to trouble the peace of the King, unlawfully entered into the office, and stayed there for an hour, against the will of the Prosecutor; and it further charged, that they made a disturbance there against the King's peace, and assaulted Grindley, so being Registrar, with intent to expel him from the office.

The Indictment was originally preferred in the Court of Great Sessions, in Wales, where the offence was charged to have been committed, but for a more impartial hearing was removed into the Court of King's Bench, and sent down for trial in the next adjoining county, before a Special Jury, at Shrewsbury, where Mr. Adam and Mr. Erskine attended on special retainers; the former as Counsel for the Prosecution, and the latter for the Bishop and the other Defendants.

In the pursuit of our plan, to preserve some remarkable Speeches of Lord Erskine, when at the Bar, we felt that we could not, upon this singular occasion, have recourse to a better or more impartial preface, than to introduce, at length, the Speech of Mr. Adam, who conducted the Prosecutor's case with the greatest zeal, ability, and eloquence; his Address to the Jury containing all the facts intended to be proved and relied on; and as the Speech of Mr. Erskine, for the Bishop, comprehends, also, the whole body of the evidence as it remained after the examination and cross-examination of the witnesses, and on which, therefore, he rested his Client's claim to acquittal, having called no witnesses on the part of the Defendants, the whole matter for judgment appears most distinctly, from the two Speeches, without the intro-

duction of the proofs ; more especially as we have also printed the summing up of the evidence by the Judge.*

THE KING V. THE BISHOP OF BANGOR AND OTHERS.

MR. ELLIS opened the Pleadings.

MR. ADAM FOR THE PROSECUTION.

MAY IT PLEASE YOUR LORDSHIP,

GENTLEMEN OF THE JURY,

You have heard from my Learned Friend, who has opened the pleadings to you, that Samuel Grindley is the Prosecutor, and that he is Deputy Registrar of the Diocese of Bangor.—You have heard, likewise, that the Defendants are, the Bishop of Bangor, three Clergymen, and a gentleman who is Agent for the Bishop.

In the outset of this cause I have already learned enough, from the manner in which my Learned Friends have received the opening of the pleadings, to show me; that they seem to have an inclination, as it were, to make that a jest, which, I can assure you, is a matter

* They who may wish to refer to the proofs themselves, will find them in the printed report of the Trial, as taken in short-hand by Mr. Gurney, from which these Speeches are taken, and which was published at the time, by Mr. Stockdale, of Piccadilly.

of extreme seriousness.—Gentlemen, I introduce it to you with all the anxiety which belongs to a person who is unaccustomed to address you—I introduce it with the anxiety which belongs to a person, who is to maintain a conflict with abilities that are seldom unsuccessful; but I open it to you, I do assure you, in the pure spirit of moderation and of candour; and, if I might say so in a question of this sort, in the pure spirit of the true principles of Christianity; that is, of wishing that all mankind should do unto others as they wish to see done unto themselves.

Gentlemen, I wish to call your attention to it seriously, and will just take the liberty of stating, why *you* are called upon to judge in this cause.—The question to be tried did not happen within your ordinary jurisdiction: it was not in this county that the offence, which is complained of, took place: but an application has been made to remove it here; and it is possible that such an application might produce some prejudice in your minds, as if there had been something in the conduct of the party, for whom I have the honour to appear, which has made it improper to permit the question to be tried where it arose. The application to remove the cause from Wales to the nearest English county, was made upon an affidavit, which I have not seen, and was granted by Lord Chief Justice Kenyon, who undoubtedly exercised his discretion wisely and justly, as he does upon all occasions. He thought, that, under the circumstances stated by those concerned for the Bishop of Bangor, and upon the affidavit made by those who

are prosecuted, without any opposition or interference of any sort or kind whatever by the person who appears here as the Prosecutor, that it was fit to remove it.—When he did so, I know he removed it to a tribunal of uprightness, of virtue, and honour.—I know he removed it to a situation where, I am confident, intelligence and integrity will alike prevail; and I am by no means afraid of the mere circumstance of its being removed, having any influence upon minds like yours.

Gentlemen, there may have arisen prejudices in this, as there do arise prejudices in many causes. Undoubtedly, this is not the first time that the matter has been the subject of conversation and discourse; probably it is not the first time that even you, who are impannelled to try the cause, may have heard of it. It is my duty to my Client, it is my duty to the public likewise, if there should have been any such conversation about this prosecution, to remove all those prejudices, to remove all the impressions that may have been received, not only from your minds, were it possible you could have received them, but from all those that stand around. I say it is important to my Client, and it is important to the cause of public justice, that I should endeavour to remove them.

Gentlemen, I beg leave to state to you, in the temperate spirit which I have professed, that this is not a question, in which the general religious establishment of the country is at all involved—it is a question, I can assure you, which is confined to the individuals

who appear upon this record. It reaches no further than *their* conduct, on the *particular* occasion. It is a question which cannot, I am sure, have the least effect to the prejudice of that doctrine, or to the prejudice of that rank and situation in the state, which is so important to the well-being of society, and so essential to bind together, and to sustain, those principles which tend, not only to our happiness hereafter, but to the good government of the world in which we now live. I pledge myself, then, that, when you come to hear this case, you will find that the facts I shall prove are confined singly and solely to the parties named in this Indictment.

Gentlemen, there is another circumstance to which I could wish to call your attention, before I enter into the merits of the case—namely, that although a Church Dignitary stands in the front of those indicted, *that* is no reason whatever, why this Indictment should not have been preferred ; for if the facts which I have to state to you, and which I shall afterwards prove—if the principles of law which, under his Lordship's direction, I shall have the honour to lay down to you, are correct, you will find that the public justice *must* be satisfied by a verdict of Guilty, notwithstanding the rank and situation of the first individual who is indicted.

It is a painful thing to me, not only on account of his rank and his situation, as a Bishop of the Church and as a Peer of Parliament, to address you upon a subject of this sort ; but it is more so when I consider, that, in the intercourse of my professional

life, I have had frequent occasion to see that person discharging duties in another place, in a judicial and legislative capacity : I have often had the honour, and I will say too the satisfaction, to address him in that station. Gentlemen, I can assure you that I speak with no personal feelings against the Bishop ; they are all naturally on the other side. But what is more, I can assure you that my instructions are, to conduct the cause in a pure spirit of temper and moderation, such as I have already described to you.

Gentlemen, this is not the only time that dignitaries of the church have been indicted, and found guilty. You have but to look back to the bead-roll of the State Trials, and you will find many instances of the sort. You have but to reflect a few years back, when a person, upon an indictment, removed in the same manner, though not a Bishop, yet a dignitary in the church, was brought into this Court, for reasons similar to those which bring you now here to try this Indictment. They who heard my Learned Friend* upon that occasion, they who have read the history of that period, cannot forget the uninterrupted stream of splendid eloquence and of powerful ability, which has been rolling on, with increasing force, from that period to the present moment, and which, then almost in its infancy, was exerted in a question similar to that in which I have now the honour to address you, which marks that there was, within our own memory, in this very place, a prosecution of a church

* Mr. Erskine, as Counsel for the Dean of St. Asaph.

dignitary for a misdemeanor, as there is upon the present occasion.

Gentlemen, I will state plainly why this question is tried, and why you are called to deliver a verdict upon it. It is, in the first place, upon principles of public justice, in order that the justice of the country may be satisfied.—The prosecution is likewise proceeded in, on another principle, which I am sure I am warranted by the law of the land to state as a sound one ; it is founded in an honest, fair, justifiable attempt, upon the part of this Prosecutor, to vindicate his own character through the medium of this prosecution—I say, when I assert that to you, I state a legitimate ground of prosecution, and one that is consistent with the laws of the country : for it is in the power of any individual to use the name of His Majesty for the purpose of public justice ; ay, and for the purpose of vindicating his own character and reputation. It is done every day in the case of libel, and may equally be done in the case of assault, or riot.

The situation of this Prosecutor was, and is, that of a person, who by industry in his profession, and in the different situations which he held in the part of the country where this offence was committed, gained to himself a livelihood : He found himself at once in the eye of that public where he lives, in the circle of that community and society to which he belongs (if he did not take some method of bringing this matter forward to the public observation of the country, and of bringing these Defendants forward to receive the public justice of the country), in the

risk of being, in all probability, deprived of the honest earnings of his industry, and of the situations which he held for the benefit of himself, and the support of his family.—These are the principles upon which this prosecution is brought forward; these are the principles which do not at all involve any thing of a vindictive spirit; they are principles upon which every honest man daily acts; they are principles upon which every honest man may legally act. Who could have blamed Mr. Grindley if he had brought an action of damages against the Bishop, for the injury he has suffered? What is the situation in which he stands here—not bringing an action for damages indeed, but preferring an indictment? I will venture to say, that, under the circumstances of this crime, and agreeably to the matter charged in this *Indictment*, a prosecution leaves the Defendants more ample means, and a better mode, of defending themselves, than if an *action* had been brought, and they had been put to plead a justification to that action. These are the points to which I wish to call your attention, in order that your minds may come coolly, deliberately, and without prejudice, to the trial of this cause.

Gentlemen, the Indictment, as you have heard, states, that the parties upon this record were guilty of a riot, by entering into and doing certain acts in the office which belonged to the Prosecutor, as Deputy Registrar of the diocese of Bangor. It states nothing but a riot. There is no count in this indictment singly for a common assault, although it is the common mode, in drawing indictments of this sort, to conclude with the charge

of a common assault, with a view of securing a verdict, in case the facts should not come up to the proof of a riot. I wish to call your attention particularly to this, because it shows, there was no spirit to catch, by a hair, these parties, for conduct, which, if it does not amount to a riot, is not the subject of which this Prosecutor means to complain.

It is necessary for me (and I shall do it very shortly, indeed, before I enter into the state of facts which I must lay before you) to explain the law upon the subject of riot.—There are various offences which people commit, congregated together, which receive different denominations in law, from the simple offence of an affray, up to that of a riot, which it may be well for you to know, in order that you may be able to apply the evidence when you come to hear it. The case of an affray, is a matter which arises accidentally, without any premeditation or intent.—The next in order, is an unlawful assembly; that offence consists in persons assembling together, to do some act respecting private property (not concerning the affairs of the public), and separating without doing any act whatever.—There is another case, commonly denominated a rout, which is, advancing towards the act, without arriving at it.—The highest in order, is a riot; in which there must be these ingredients: in the first place, there must be three or more persons engaged in it; in the next place, there must be an intent and purpose in the parties to commit a riot; and, in the third place, it is essential that it should have for its object some matter of private concern.—When you come to hear the evidence, you

will always bear this definition in your mind: which, I am satisfied, my Learned Friend will not contradict, and I am equally satisfied my Lord will support me in, when he comes to address you.

I pledge myself, then, to prove, that the Bishop of Bangor, and the other Defendants upon this record, were guilty of that which I have last described—that there were three or more of them—that they committed a riot, in a matter respecting private property, and that they had an original intent and purpose in the act which they did. With regard to the intent and purpose, you will always observe this—that, intent and purpose may either arise from the facts and circumstances that exist at the time of the transaction, which, by inference, establish a necessary presumption of an original intent; or, it may be made still more palpable to you, by showing a line and tissue of conduct which necessarily involves that intent and purpose, and, therefore, renders presumption unnecessary, by giving you clear, demonstrative, decided proof, arising from the acts and transactions of the parties establishing a pre-meditated design, intent, and purpose, in the acts which they did. You will find that this last observation will apply, most materially and forcibly, to the evidence I am about to lay before you, and the circumstances I am about to recite.

I profess, Gentlemen, again and again, that I have no object in view, but making you understand this case; and if, in the course of my address to you, I either elevate my voice, or give into a manner of action that is contrary to the utmost moderation, I

trust you will attribute it to habit, and not to intention.—I have no wish, but coolly, deliberately, and calmly to make you masters of the facts, the circumstances, and principles, upon which this important cause must be decided.

Gentlemen, I have already stated to you, that the Prosecutor of this cause was Deputy Registrar of the consistorial Court of the diocese of Bangor.—It is essentially necessary that I should make you acquainted with the nature of that office; and not only that you should become acquainted with the nature of the offices of Registrar and Deputy Registrar, generally, but that you should likewise be made acquainted with the particular circumstances and local situation of the Prosecutor and his office.

The Deputy Registrar is appointed by the Principal Registrar.—The general nature of the office of Registrar is, that he has the custody of all the archives and muniments that relate to the spiritual court of the diocese: that is, he is to register all the acts of a juridical nature; and he is, besides *that*, the Registrar of all the wills and testaments of the persons who die within the diocese. So that, you observe, it is an office of great importance, and extending to the interest and property of a vast portion of the community; that it is an office, where the safe custody of the different archives and muniments is of the utmost consequence. Certainly, according to the law of the land—according to the decided cases to which, if it is necessary, I can refer his Lordship, it is competent to appoint a minor to the situation of Registrar; and, accordingly, the

present Bishop of Bangor, upon the resignation of the former Principal Registrar, did appoint a nephew of his, a minor, to be Principal Registrar.—As it is competent to the Bishop to appoint a minor to be Principal Registrar, so it is equally competent that that minor should, by some mode, appoint a deputy.

The reason why a minor can, in this case, deviate from the general rule of law, and do an act appointing a deputy, is, because it follows, from necessity, that the business of the office of Registrar *must* be discharged. If the minor could not appoint, of course the duties of the office could not be discharged, and therefore, *ex necessitate rei*, from the necessity of the case, the minor is at liberty to appoint a deputy. But the power of the minor goes no further—there the law stops. The general rule of law is, that a minor can do no act—that he has no will, because he is not supposed to have understanding to act for himself. The exception, in this particular case, is, that the minor does an act for the purpose of appointing his deputy; but the necessity goes no further. I have it in my power to state to you, from a very recent decision, as well as from the very nature of the thing itself, that this Registrar cannot remove his deputy; for in this very case an application was made to the Court of King's Bench (and though this may be tedious, it is an important part of this business), an application was made to the Court of King's Bench for a mandamus, calling upon the present Prosecutor, Mr. Grindley, to deliver over to a person, of the name of Roberts, all the muniments within his power, and to deliver up to him likewise the

keys of his office, and thereby give him possession of the place where the business is conducted, and where the muniments are preserved.—The result of that application, for the order of the Court to compel this to be done, was, that it was denied by the Court ; and I have the authority to say, from those who heard it, that the ground upon which it was denied was this : Lord Kenyon was of opinion, that it was essentially necessary to apply to the Court of Chancery, to appoint a proper guardian for the minor, that there might be sufficient authority to appoint another Deputy Registrar in the stead of Mr. Grindley ; but that he, being in possession of this office, and Mr. Roberts not showing a right to the possession of the office, it was impossible for the Court to grant the order applied for.

I have, then, established clearly, in the first place, that Mr. Grindley was in possession of the office ; and, in the next place, that there was no legal power to remove him.—Consequently, although, from necessity, the minor may appoint in the first instance, yet, if the office of Deputy Registrar is properly discharged, that necessity not existing for the removal, the Deputy Registrar must remain until the Principal arrives at the years of majority ; or until he has such a guardian appointed by the Court of Chancery, as is capable of acting in such a subject matter.

Gentlemen, there is one other circumstance I wish to state respecting the law upon this subject—namely, that where a Registrar is appointed by the Bishop, and a Deputy appointed by the Registrar, and the Principal Registrar is a person not in a situation to act,

there is no power and authority, on the part of the Bishop, to remove the Deputy Registrar.—The Bishop, by law, has no power or authority whatever to remove the Registrar or Deputy Registrar, except in the following manner. If the Registrar, or his Deputy, does any act or acts which are, in their nature, contrary to law; if they do not act consistently with the duties of their office, then, in that case, undoubtedly, the Bishop may suspend, but his suspension is confined to “a year “or more;” and it has been decided, that the words, “or more,” do not extend indefinitely to any period, but must be confined to a reasonable period subsequent to the year. Gentlemen, I beg you will bear this position of law in your mind, because you will find, throughout the whole of this cause, that the Bishop has had no fault whatever to find with Mr. Grindley, in the discharge of the duties of his office; for he has never thought him amenable to his jurisdiction for the purposes of suspension; that he must have conceived, therefore, that in the discharge of the duties of his office, he has acted like an honest, faithful guardian of his public trust.—If he had not done so, would not this Bishop, who, as I shall prove hereafter, attempted first by art, and afterwards by force, to remove him from that situation, would he not have made use of his suspending power? Would he not, near the period of the minor Registrar coming of age—which would have been in less than a year from these transactions—would he not, I say, have suspended him for a year or more, in order that the trust might not have been discharged improperly? by which means, the minor, when he

arrived at the age of twenty-one, when he would have the free exercise of his own will, might, according to law, have exercised the power of amotion over his Deputy at his pleasure, without assigning any cause whatever for the removal ?

Gentlemen, it is material, in the discussion of this cause, and most material to your understanding the evidence, that you should know the particular situation of the office ; I mean *the local situation of the place* in which the muniments and records are kept. It is, as I understand, built adjoining to and upon the cathedral church of Bangor ; there is a flight of steps rising to it, and you go through a porch, on which there is an outer door.—Having got within the porch, there is an inner door opens to the registrar-office ; the office is directly opposite to the Bishop's palace ; there is nothing but a courtyard between them ; and it is so near, that every voice, perhaps, may be heard from the one place to the other ; of that, however, I am by no means certain, but it certainly is within sight of the Bishop's palace, adjoining to, and built upon, the cathedral.

I have stated the duties of this office ; I have shown you that they are grave and serious duties : I have stated the responsibilities of this office ; I have shown they are grave and serious responsibilities : I have stated the nature of the muniments kept in this office and the place in which they are kept : and I contend, I think, without the hazard of contradiction by my Learned Friends, that the person who was thus appointed Deputy Registrar, was irremovable, except by

the mode of suspension by the Bishop, in the manner I have mentioned. He was not removable by the minor, but through the medium of a guardian, which guardian must be appointed by the Court of Chancery.—The Deputy Registrar, thus invested with this office, so charged with those duties, and these responsibilities, had as good a right and title to possess that office—to possess the house or place which I have described, to maintain it,—to take it again if it was taken from him, and to defend himself in it, as any Englishman has to defend his house, which is emphatically denominated his castle.—It is impossible to compare it more accurately. All the circumstances that belong to the sanctuary of a house, belong to the sanctuary of this office. The sanctuary of our house is for our repose, quiet, and security; it is, that we may protect our families: the sanctuary of this office is not, that the family of an individual may be protected, but is for the protection of the interests of an extensive community; it is, that all the devises of personal estates, that all the records in the office of a legal and a judicial nature, that all the interests of a large and important diocese, may be protected. Then, all the arguments for a man's maintaining and defending the possession of his house, apply infinitely stronger to an office charged with such responsibilities.—It is impossible that he can secure, it is impossible that he can maintain that, which is essential for him to justify his conduct towards the public, without maintaining possession of the building, where these things are preserved; and every person who attempts to trespass upon it, is

a trespasser in the eye of the law ; every person who makes a riot in it, is amenable to the justice of his country.

I have described the situation of this office ; it is built adjoining to the cathedral ; the wall of it runs into the wall of the cathedral.—I have described the nature of it ; it is a spiritual office.—Is it possible that any thing can amount more nearly to the description, which the great Roman orator gave as the definition of a house : “ *Quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civis ?* ” What can be more holy ? What can be more protected by every principle of religion ?—This is a spiritual office—it is a spiritual office carried on in a building annexed, in local situation, to the cathedral church.—Thus annexed by duty, and annexed by situation, it falls in precisely with the comparison I have made : and shows you, that this gentleman, Mr. Grindley, was bound, for his own sake, for the sake of the public, with whose interests he was intrusted—for the sake of the community of the diocese to which he belonged—by the sacred situation of the place of office, to possess, and protect his possession in it, that the muniments and the archives might be preserved.

Gentlemen, I am sorry I have detained you so long in the preliminary part of this case : I hope, however, I have not wandered, but have confined myself accurately to the question before you. I think I have done no more than laid that ground, which is necessary for your understanding the facts : and I now come to state to you, precisely and accurately, what

the nature of those facts is. I told you, originally, that I aim only at distinctness. If I have that quality, I have every thing I can wish. In order to be distinct, and in order to show you with what mind and intent this riot was committed, I anxiously entreat your attention to the commencement of the connexion between Mr. Grindley and the Bishop of Bangor.

Early in the year 1792, Mr. Grindley was appointed Agent for the Bishop of Bangor. In the month of February of that year, the Bishop appointed his nephew, a minor, to the situation of Registrar of the consistorial court of the diocese. In the month of March 1792, Mr. Grindley was appointed Deputy Registrar. He continued to act in the situation of Deputy Registrar, down to the year 1794, when, for the first time, he saw the minor, who confirmed the appointment, and who treated him as his Deputy Registrar. The bargain was, that Mr. Grindley was to pay his principal seventy pounds a year.—He discharged the regular payments.—He continued to act in his office, without any offence to the Bishop; and that he had committed no offence in his office is clear, otherwise he, the Bishop, must have suspended him. He continued, I say, to act in the discharge of the duties of his office, down to the autumn of 1795. Here then begins the history which gives origin to this prosecution.

The approach of the general election led the Bishop of Bangor to think, that he might, perhaps, be serviceable to some of his friends; and he thought those immediately under him were likely to be influenced by

him.—He applied to Mr. Grindley, for his interests in the County of Caernarvon. His application did not meet with the reception, or with the answer, he expected. Mr. Grindley thought, as I hope every Englishman thinks, that he had a right to the free exercise of his franchise, and the free exercise of his influence; but although he thought so, I can assure you that he behaved with great temper and moderation.—Mr. Grindley now found, that his connexion with the Bishop became a connexion that was not so comfortable, if they were not to agree in their election interests; he thought it right, therefore, to resign the office of Agent to the Bishop; and he accordingly resigned his place of Agent in the month of January.—At the time he did so, he signified expressly, that on the 22d of February, he would resign the office of Deputy Registrar.—Now could any thing be more moderate?—You may, perhaps, ask, why he did not resign the office of Deputy Registrar at the time he resigned the situation of Agent? The reason he assigned was this, and it is a valid and substantial reason—that his year of appointment as Registrar ended upon the 22d. of February 1796; that, by retaining the office till that time, he should be enabled to make up his accounts, to settle all his business, and then he would quietly take his departure from it.—Could any thing be more moderate, could any thing more be wished for by the Bishop? If this Registrar had become obnoxious to him, because he did not obey him in matters with which the Bishop, I must say, ought to have had no interference, either as a

Bishop or as a Lord of Parliament ; if he wished to get rid of Mr. Grindley, might he not have had that patience which ought peculiarly to belong to the character of those, who appear as Defendants upon this indictment ? Might he not have had patience but for a little month, till the Deputy Registrar voluntarily resigned his office ? There is something in this conduct of the Bishop, which it is almost impossible to account for, unless one were to dive into those speculations, which have led one to know what the motives, and what the feelings of men are, in different situations of life, and in different characters in society.

I recollect a very profound and a very wise saying, equally true as wise, with respect to the clergy. It was said of them, “ That they had found, what Archimedes “ only wanted, another world, on which to fix their “ fulcrum, by which they moved this world at their “ pleasure.”—That saying will go far to expound this conduct. In all spiritual matters, it is a wise, a just, a true maxim, calculated to show the true principles upon which the clergy possess, and truly and justly, and eminently and beneficially to the society in which we live, possess that influence upon mankind, which ought to belong to their character and situation in all spiritual affairs—but when they travel from spiritual to temporal concerns—when they quit the affairs of the other, and look only to the concerns of this world ; when they interfere in politics above, or in elections below, then that character, which directs their influence in their clerical function, unfortunately follows them into their temporal concerns. If they

are disappointed, they cannot brook it.—They have been taught to regard mankind as persons whom they are to govern at their pleasure—they are incapable of smoothing the matter over, as men, more accustomed to the ordinary concerns of life are; and their spiritual power uniformly follows them into temporal concerns, if they are imprudent enough to mix in them. This is vouched by the history of the world, in all ages; it is vouched peculiarly by the history of this country. Who ever heard of Sherlock or Lowth interfering in such matters? No; They were enabled to move this world at their pleasure, because their lives were spiritual and holy. Who has not heard that Wolsey and Laud were of a different character and description? The *Ego ex Rex meus* of Wolsey, and the violence of Laud, against the privileges of the people of England, are equally to be collected from that witty, wise, and just maxim to which I have alluded. Such is the situation of the persons concerned.—

- Gentlemen, it does not signify whether the scene is in the world at large, or in the county of Caernarvon; whether it is transacted in the palace of Whitehall, or in the churchyard of Bangor;—the same causes, in the hand of the Supreme Being, directing this world to its good, will always produce the same effects; and I cannot account for the Bishop not having accepted of this moderate, of this attentive, of this happy proposition (I might almost say, if it had been accepted) of the Deputy Registrar, but that he had deviated, from what he does not, I am sure, often deviate from,—from spiritual to temporal concerns;—that he

had forgot the concerns of that pure and humble religion, of which he is an eminent pastor, and that he had been drawn aside by the peculiar interests of friendship, by the strong ties of connexion, or by something else, in order to act in the manner which I have described to you.

In fact, the resignation has not been made at all ; and the transactions, which I am about to relate, will show the reasons why it has not been made, and will prove, that it was not possible to have been made with safety. Mr. Grindley found, the Bishop had become hostile to him ; he found, he was no longer safe in resigning it into hands, that could not legally accept the resignation ; he found he could not have that confidence, which would have taken place, if it had been left to his own freedom and choice ; and that, after he had resigned into the hands of a minor, he would, in point of law, have retained all the responsibilities of the office, without being, in fact, in the office, to discharge the duties ;—Therefore it is, he has not resigned the office. But the transaction which I am about to state to you, and I am now come to the real question in the cause (though I humbly think, under his Lordship's direction, that nothing I have said is irrelevant)—the transaction I am about to state to you, will unfold the whole.

Between the fourth and the eighth of January 1796, which you see was a month previous to the term of the proposed resignation, these transactions took place.—First of all, the Bishop, in the absence of Mr. Grindley, the Deputy Registrar, sent for the

seals ; and he obtained one seal. I think the other seal Mr. Grindley's clerk had not in his possession, and it was not delivered.—This was intimated to Mr. Grindley ; and Mr. Grindley, imagining that the Bishop, having obtained one seal, might possibly attempt to obtain the keys ; he, therefore, being at that time in Anglesey, wrote to his clerk to beware not to give the Bishop the key of the office if he asked for it. The Bishop did ask for it ; and was refused.—Upon the 7th of January, Mr. Grindley returned, and found that his office had been broken into.—He ascertained, as I shall prove, from the Bishop's own mouth, that the Bishop had given directions to break open the window of the office, to take the locks off the door, and put on other locks.—In this situation Mr. Grindley found himself, respecting an office, for the duties of which he was legally responsible ; for he is, both in law and in fact, Deputy Registrar, and has been so from the year 1792, down to the present time, without any attempt to cast a slur on his character in the discharge of his duties.

Gentlemen, I come now to the principal facts ; and I can assure you I will act in the spirit which I professed at the outset. I wish to state every thing candidly to you ; I have nothing to hold back. I do not mean to say that, upon every occasion, it is possible to justify persons in their transactions for moderation and for prudence ; and yet I think, when you examine the transactions of Mr. Grindley, you will see under all the circumstances, that they were neither immoderate nor imprudent.—Mr. Grindley's offer of

resignation had been scoffed at, and rejected.—He had been treated in such a way as to make it natural to suppose that he would be exposed as a culprit, in the discharge of his duty, to the whole community to which that duty appertains. He found, that it was essentially necessary for him to know in what state the muniments and archives were, which he alone had a right to the possession of.—He found the means of entrance debarred, and, therefore, determined to get admission to the office; and, having got admission, he determined to maintain himself in the possession of it, as he had a full right to do.

In the morning of the 8th of January, Mr. Grindley went to the office, with the means of getting admittance into it.—You will observe, that the first attempt to get possession of the office had been on the part of the Bishop.—You will always recollect, that the Bishop has no earthly right to the possession of the muniments of that office, as long as the Registrar properly discharges the duty of the office.—He has no right to keep the Registrar out of his office, but the Registrar has a right to keep all mankind out of it, except those who come upon business, and except the Bishop when he comes in the discharge of his duty *as Bishop of Bangor*.—Mr. Grindley imagined, from the violence that had taken place before, that is to say, from the violent breaking into the office originally, and from the offer of compromise on his part, and even of resignation, being wholly rejected, he imagined, and it was natural so to imagine, that force would be opposed to force, when he once got posses-

sion of his office; and therefore, undoubtedly, Mr. Grindley went provided, so as to secure himself against the possibility of that force depriving him of his office.—Gentlemen, I insist, that when he was in possession of his office, he had a right so to do. All this will be proved—I say it will proved: because I know Mr. Grindley, who is the first witness, is a person beyond the suspicion of not acting agreeable to his oath.—The oath is, “that he shall speak the truth, the whole truth, and nothing but the truth.”—It has been uniformly expounded, that a person, who does not speak the whole truth in a court of justice, is as criminal as he who speaks a direct falsehood.—I feel myself bound in duty and in conscience, as an advocate, to state to you the whole truth; and Mr. Grindley is a man of that conscience, that he will speak the whole truth in the manner in which the thing happened. It will then be for you to judge, under all the circumstances; and I think that, whatever opinion you may form with regard to Mr. Grindley's rashness in his manner of getting possession of the office, and his determination to maintain possession of it, you will be convinced, that the Bishop and those indicted, were in fact guilty of a riot, for endeavouring to get possession of it, and coming and interrupting him in the manner I shall describe and prove.

Mr. Grindley went with pistols in his pocket; but it will be proved, *these pistols were unloaded*.—Now, I can assure my friends (whatever gestures they may make) that I am not the least afraid of this fact.—I say, his going with *unloaded* pistols, proves, that he had, in

regard to getting possession of the office, no intent of offence whatever.—He took powder and shot, with which, when he got possession, he loaded his pistols—which proves that he was determined, being in peaceable possession of his office, to maintain that possession; and I contend, that the Deputy Registrar of the diocese, under the circumstances I state, had a right so to do.—I say, that every argument, every fact which applies to the case of a man's own house being his castle, applies to this case.—Mr. Grindley, after he had opened the outer door in the porch, in order to prevent any riot, and for the purpose of intimidation, threatened one of the persons who came from the Bishop's house to interrupt him, with an unloaded pistol; for it will be proved, that the pistols were loaded at a *subsequent time*. After this first attempt to disturb him, there was a considerable interval; and during this interval Mr. Grindley got into the inner door. Mr. Grindley being thus in the office, the Bishop and various of his servants arrived.—The Bishop hollowed with a voice so loud (as will be proved to you) that Mr. Grindley did not know it; his passion was so vehement, that it was absolutely impossible to distinguish his voice.—The moment Mr. Grindley knew it was the Bishop, he said he had no objection to the Bishop's being let in, and he desired his servants quietly and peaceably to retire to a further corner of the room.—Mr. Grindley then came forward, and said, that whatever business was to be done, he was ready to do it; that he considered himself as the legal officer, and he was then in the quiet possession of his office; that, with regard

to his Lordship, he was perfectly willing he should come into the office, but he begged that his Lordship's boisterous and tumultuous conduct might cease.—I really wish, rather that the witnesses should describe what passed afterwards, than that I should.—But instead of that tumultuous conduct ceasing, the Bishop approached first to Mr. Grindley, afterwards to his servants, with threatening gestures, and with threatening words, laying his hands upon them; and he was assisted by the four other persons indicted, who afterwards came into the office, whose actions and words were precisely of the same kind and description.

Gentlemen, one of the grounds of riot which you have to try, is this, That here was a person, legally entitled to the possession of his office, illegally forced from that office; he had taken possession of this office, and remained in the quiet possession of it.—Now, whether he did so in a manner that a perfectly calm and unconcerned spectator may approve of, as an abstract case, I do not know; but I am addressing myself to persons who have human passions; I am addressing myself to Gentlemen, who know what human nature is; and I am sure, that in an outrage of this sort, committed after a voluntary offer of resignation, such as I have stated; after a conduct so peaceable and quiet, even a worm, if trod upon, would have turned again.—Mr. Grindley had got quietly into the possession of his office, and then, after a lapse of time, this office was again attacked in the riotous, tumultuous, and extraordinary manner which the witnesses will state, but which I forbear detailing, because, in the first place, it

is unnecessary for your understanding the cause, and in the next place, it is painful for me to state it. This disturbance went on a considerable time, and at last it ended only by persons, whose sex and character I have too great a respect for, to introduce them into the cause, more than just to say, that by the intervention of Mrs. Warren and two ladies, the Bishop was at last quieted from his passion, and withdrawn from the riot. There the business ended. Gentlemen, this is the case which you have to try ; and I think I can venture to say, that if the facts are proved in the manner I have described, and I take it upon me to say I have stated them most correctly, it is impossible for you not to find a verdict for the Prosecutor.

Gentlemen, it would be in vain, and an absurd thing in me, to detain you with any particular address to yourselves. I have the honour of knowing hardly any of you personally, although among the Jury there are some gentlemen whom I have had an opportunity of seeing in another scene in life. I know your characters, and I know that however you may feel yourselves bound to protect the ministers of our church, though I think this prosecution can have no effect upon any but the particular churchmen engaged in this transaction, that you will yet guard yourselves against deviating from those principles according to which you are bound to act, and that you will find according to the evidence.

Gentlemen, there is no principle implanted in the human mind, stronger than the sympathy which we feel for the situation and sufferings of persons of high

rank and condition ; it is one of those principles that bind society together ; and is most admirably infused into our nature, for the purposes of good government, and the well-being of civil order.—But whatever the rank may be, that rank can never stand between a defendant and the proof of the fact, with a jury of Englishmen. They know their duty too well : neither compassion, sympathy, nor any other principle, can possibly affect their minds.—Consider what is the peculiar situation of these Defendants ; reflect, that they are set apart by the laws of the land, and the regulations of the Christian religion, for the purpose of preaching the doctrines of Christ. Our law has been so peculiarly cautious with respect to their character, that even when it empowers the civil magistrate to quell a riot by calling to his assistance every other member of the community, it peculiarly excepts, with women and children, the clergy. I have brought before you persons of that description, who, instead of claiming an exemption from being called upon, have themselves been guilty of a riot ; for which they are justly amenable to the laws of their country.

After the examination of the witnesses, and the close of the Prosecutor's case, Mr. ERSKINE spoke as follows :

GENTLEMEN OF THE JURY,

MY Learned Friend, in opening the case on the part of the Prosecution, has, from personal kindness to me, adverted to some successful exertions in the duties of my profession, and particularly in this place. It is true that I have been in the practice of the law for very many years, and more than once, upon memorable occasions, in this Court; yet, with all the experience which, in that long lapse of time, the most inattentive man may be supposed to have collected, I feel myself wholly at a loss in what manner to address you. I speak unaffectedly when I say, that I never felt myself in so complete a state of embarrassment in the course of my professional life:—indeed, I hardly know how to collect my faculties at all, or in what fashion to deal with this most extraordinary subject. When my Learned Friend, Mr. Adam, spoke from *himself*, and from the emanations of as honourable a mind as ever was bestowed upon any of the human species, I know that he spoke the truth when he declared his wish to conduct the cause with all charity, and in the true spirit of Christianity. But his duties were scarcely compatible with his intentions; and we shall, therefore, have, in the sequel, to examine how much of his speech was *his own* candid address, proceeding from *himself*; and what part of it may be considered as arrows from the quiver of his CLIENT.—The cause of the Bishop of Bangor can suffer nothing from this tribute, which is equally due to friendship and to

justice :—on the contrary, I should have thought it material, at any rate, to advert to the advantage which Mr. Grindley might otherwise derive from being so represented.—I should have thought it right to guard you against blending the Client with the Counsel.—It would have been my duty to warn you, not to confound the one with the other, lest, when you hear a liberal and ingenuous man, dealing, as he does, in humane and conciliating expressions, and observe him with an aspect of gentleness and moderation, you might be led by sympathy to imagine that such were the feelings, and that such had been the conduct, of the man whom he represents.*—On the contrary, I have no difficulty in asserting, and I shall call upon his Lordship to pronounce the law upon the subject, that you have before you a prosecution, set on foot without the smallest colour or foundation—a prosecution, hatched in mischief and malice, by a man, who is, by his own confession, a disturber of the public peace ; supported throughout by persons who, upon their own testimony, have been his accomplices, and who are now leagued with him in a conspiracy to turn the tables of justice upon those, who came to remonstrate against their violence, who honestly, but vainly, endeavoured to recall them to a sense of their duty, whose only object

* No observation can be more just than this.—It is the most consummate art of an advocate, when he knows that an attack is likely to be made upon his Client for turbulence and malice, to make the Jury think, by his whole speech and demeanour, that mildness and justice were his characteristics ; and Mr. Adam appears, with great ability, to have fulfilled this duty.

was to preserve the public peace, and to secure even the sanctuaries of religion from the violation of disorder and tumult.

What then is the cause of my embarrassment?—It is this.—In the extraordinary times in which we live; amidst the vast and portentous changes which have shaken, and are shaking the world; I cannot help imagining, in standing up for a Defendant against such Prosecutors, that the religion and order, under which this country has existed for ages, had been subverted; that anarchy had set up her standard; that misrule had usurped the seat of justice, and that the workers of this confusion and uproar had obtained the power to question their superiors, and to subject them to ignominy and reproach, for venturing only to remonstrate against their violence, and for endeavouring to preserve tranquillity, by means not only hitherto accounted legal, but which the law has immemorially exacted as an INDISPENSABLE DUTY from all the subjects of this realm. Hence, it really is, that my embarrassment arises; and however this may be considered as a strong figure in speaking, and introduced rather to captivate your imaginations, than gravely to solicit your judgments, yet let me ask you, Whether it is not the most natural train of ideas that can occur to any man, who has been eighteen years in the profession of the English law?

In the first place, Gentlemen, Who are the parties prosecuted and prosecuting?—What are the relations they stand in to each other?—What are the transactions, as they have been proved by themselves?—What

is the law upon the subject?—and, What is the spirit and temper, the design and purpose of this nefarious prosecution?

The parties prosecuted are, the Right Reverend Prelate, whose name stands first upon the Indictment, and three ministers and members of his church, together with another, who is added (I know not why) as a Defendant.—The person prosecuting is—(*how shall I describe him?*)—For surely my Learned Friend could not be serious, when he stated the relation between this person and the Bishop of Bangor.—He told you, most truly, which renders it less necessary for me to take up your time upon the subject; that the Bishop is invested with a very large and important jurisdiction—that, by the ancient laws of this kingdom, it extends to many of the most material objects in civil life; that is, has the custody and recording of wills, the granting of administrations, and a jurisdiction over many other rights, of the deepest moment to the personal property of the King's subjects.—He told you, also, that all these complicated authorities, subject only to the appellate jurisdiction of the Metropolitan, are vested in the Bishop.—To which he might have added (*and would, no doubt, if his cause would have admitted the addition*), that THE BISHOP HIMSELF, and not his temporary clerk, has, in the eye of the law, the custody of the records of his church; and that he also is the person whom the law looks to, for the due administration of every thing committed to his care:—his subordinate officers being, of course, responsible to *him* for the execution of what the law requires at *his* hands.

As the King himself, who is the fountain of all jurisdictions, cannot exercise them himself, but only, by substitutes, judicial and ministerial, to whom, in the various subordinations of magistracy, his executive authority is delegated; so, in the descending scale of ecclesiastical authority, the Bishop also has *his* subordinates to assist him judicially, and who have again *their* subordinate officers and servants for the performance of those duties committed by law to the Bishop himself; but which he exercises through the various deputations which the law sanctions and confirms.

The Consistory Court, of which this man is the Deputy Registrar, is the BISHOP'S COURT.—For the fulfilment of its duties, the law has allowed him his chancellor and superior judges, who have under them, in the different ecclesiastical divisions, their surrogates, who have again their various subordinates; the *lowest*, and *last*, and *least* of whom, is the Prosecutor of this Indictment; who nevertheless considers the cathedral church of Bangor, and the Court of the Bishop's see, as his own CASTLE: and who, under that idea, asserts the possession of it, *even to the exclusion of the Bishop himself*, by violence and armed resistance!—Do you wonder now, Gentlemen, that I found it difficult to handle this preposterous proceeding?—The Registrar himself, (putting deputation out of the question) is the very lowest, last, and least of the creatures of the Bishop's jurisdiction; without a shadow of jurisdiction himself, either judicial or ministerial.—He sits, indeed, amongst the records, because he is to register the acts which are there recorded; but he sits there as *an officer*

of the Bishop, and the office is held under the chapter part of the cathedral, and within its consecrated precincts, where the Bishop has a jurisdiction, independent of all those which my Friend has stated to you—a jurisdiction, given to him by many ancient statutes, not merely for preserving that tranquillity which civil order demands every where; but to enforce that reverence and solemnity, which religion enjoins, within its sanctuaries, throughout the whole Christian world.

Much has been said of the Registrar's freehold in his office:—but the term which he has in it—*viz.* for life—arose originally from an indulgence to the Bishop who conferred it; and it is an indulgence which still remains, notwithstanding the restraining statute of Elizabeth.—The Bishop's appointment of a Registrar is, therefore, binding upon his successor;—but how binding?—Is it binding to exclude the future Bishop from his own cathedral?—Is it true, as this man preposterously supposes, that, because he chooses to put private papers of his own, where no private papers ought to be—because he thinks fit to remove them from his own house, and put them into the office appointed only for the records of the Public—because he mixes his own particular accounts with the archives of the diocese—that therefore, forsooth, he has a right to oust the Bishop from the offices of his own Court, and, with pistols, to resist his entrance, if he comes even to enjoin quiet and decency in his church?—Surely Bedlam is the proper forum to settle the rights of such a claimant.

The Bishop's authority, on the contrary, is so uni-

versal throughout his diocese, that it is laid down by Lord Coke, and followed by all the ecclesiastical writers, down to the present time, that though the freehold in every church is in the parson, yet *that* freehold cannot oust the jurisdiction of the Ordinary, who has a right, not merely to be present to visit the conduct of the incumbent, but to see that the church is fit for the service of religion: and so absolute and paramount is his jurisdiction, that no man, except by prescription, can even set up or take down a monument, without his licence; the consent of the parson, though the freehold is in him, being held not to be sufficient. The right, therefore, conferred by the Bishop on the Registrar, and binding, (as I admit it to be) upon himself and his successor, is the right to perform the functions of the office, and to receive the legal emoluments.—The Registrar may also appoint his Deputy, but not in the manner my Learned Friend has affirmed; for the Registrar can appoint no Deputy without the Bishop's consent and approbation. My Learned Friend has been also totally misinstructed with regard to the late judgment of the Court of King's Bench on the subject.—He was not concerned in the motion; and has only his report of it from his Client.—Mr. Grindley was represented in that motion by a Learned Counsel, who now assists me in this cause, to whom I desire to appeal.—The Court never pronounced a syllable which touched upon the controversy of to-day; on the contrary, its judgment was wholly destructive of Mr. Grindley's title to be Deputy—for it held, that the infant, and not his *natural* guar-

dian, had, with the Bishop's approbation, the appointment of his Deputy; whereas Mr. Grindley was appointed by his *father only*, and not by the infant at all, which my friend well knew, and, therefore, gave parol evidence of his possession of the office, instead of producing his appointment, which would have been fatal to his title: and the reason why the Court refused the mandamus, was, because Mr. Roberts, who applied for it, was not a legal deputy. It did not decide, that the Prosecutor *was* the legal officer, but only that Mr. Roberts *was not*; and it decided that he *was not*, because he had only the appointment of the infant's father, which was, by the bye, the only title which the Prosecutor had himself: and although the infant was a lunatic, and could no longer act in that respect for himself, yet the Court determined that his authority did not devolve to the father, but to the Court of Chancery, which has, by law, the custody of all lunatics.

This judgment was perfectly correct, and supports my proposition, That the Prosecutor was a mere tenant at will of the Bishop.—The infant can, indeed, appoint his Deputy, but not *ex necessitate rei*, as my Friend supposes; on the contrary, he will find the reason given by the Court of King's Bench, as far back as the reign of Charles the First, as it is reported by that great magistrate, Mr. Justice Coke. It is there said, that an infant can appoint a deputy, *because the act requires no discretion, the approbation which is tantamount to the choice, being in the Bishop*.—The continuance must, therefore, in common sense, be in

the Bishop also ; for otherwise, the infant having no discretion, a proper person might be removed indiscreetly, or an improper person might never be removed at all.—I maintain, therefore, on the authority of the ancient law, confirmed by the late decision of the Court of King's Bench, *in this very case*, that the Prosecutor, who is so forward to maintain a privilege, which he could not have maintained, even if he had been Judge of the Court, and Chancellor of the Diocese, had, in fact, no more title to the office than I have.—He tells you, himself, that he never had any appointment from the infant, but from the father only, with the infant's and the Bishop's approbation ; in other words, he was the deputy *de facto* ; but, as such, I assert, he was a mere tenant at will ; and, consequently, became, to all intents and purposes, a private man, from the moment the Bishop signified his determination to put an end to his office ; and that the Bishop had signified his determination before the transaction in question, Mr. Grindley has distinctly admitted also. I thought, indeed, I should be more likely to get that truth from him, by concealing from him the drift of my examination ; and he, therefore, swore, most eagerly, that the Bishop did not offer him the key at the palace ; but that on the contrary, he had told him distinctly that he was no longer in the office. He says, besides, that the Bishop expressed the same determination by a letter ; in answer to which he had declared his resolution to hold it till the year expired.—I say, therefore, that the Prosecutor at the time in question, was not Deputy Registrar, and

that, the infant being a lunatic, the Bishop had a right to give charge of the office till another was duly appointed.—This point of law I will put on the record, if my Friend desires it.

But why should I exhaust myself with this collateral matter : since in *my* view of the subject, it signifies nothing to the question we have to consider ? It signifies not a farthing to the principles on which I presently mean to rest my defence, whether he was an usurper, or the legal deputy, or the infant himself with his patent in his hand.

Let us now, therefore, attend to what this man did, whatever character belonged to him.—This is principally to be collected from the Prosecutor's own testimony, which is open to several observations. My Learned Friend, who stated to you in his absence, the evidence he expected from him, explained, with great distinctness, the nature and obligation of an oath ; and, speaking from *his own* honest sensations, and anticipating the evidence of his Client, from the manner *HE* would, as a witness, have delivered his own,—he told you, that you would hear from him, a plain unvarnished statement—that he would keep back from you no circumstance, nor wish to give a colour to any part of the transaction.—What induced my Friend to assure us, with so much solicitude, that his witness would adhere so uniformly to the truth, I cannot imagine, unless he thought that his evidence stood in need of some recommendation. All I can say is, that he did not in the least deserve the panegyric which was made upon him, for he did not give an *unvarnished*

statement of the very beginning of the transaction, which produced all that followed.—I asked him, Whether in refusing the key, he did not mean to keep an exclusive possession of the office, and to prevent the Bishop even from coming there?—But, observe how the gentleman fenced with this plain question—“*I did not,*” he said, “*refuse him the key, but only lest he should take possession.*”—I asked him again, “If he did not positively refuse the key?”—and desired the answer to be taken down.—At that moment, my friend, Mr. Manly, very seasonably interposed, as such a witness required to be dry-nursed; and at last he said, “*Oh, the key was included.*”

The Bishop, therefore, was actually and wilfully excluded wholly from the office. For, notwithstanding Mr. Grindley’s hesitation, Mr. Sharpe, who followed him, and who had not heard his evidence, *from the witnesses being kept apart*, swore DISTINCTLY AND AT ONCE, that the key was taken from Dodd, because Grindley thought he would let the Bishop have it; and the witness said further—(*I pledge myself to his words*)—“IT WAS, THEREFORE, DELIVERED INTO MY CUSTODY, AND I REFUSED IT TO THE BISHOP—I DID SO BY MR. GRINDLEY’S DIRECTION, UNDOUBTEDLY.”—

The very beginning of the transaction, then, is *the total exclusion of the Bishop from his own court, by a person appointed only to act as Deputy, by his own consent, and during his own will; WHICH WILL he had absolutely determined before the time in question.* I am, therefore, all amazement, when it shoots across my mind, that I am exhausting my strength defending the Bishop; because, most undoubtedly, I should have been

Counsel for *him* as a *Prosecutor*, in bringing his opponents to justice.—According to this new system, I would have THE JUDGES take care how they conduct themselves. The office-keepers of the records of the Courts at Westminster, are held by patent; even the Usher's place of the Court of King's Bench is for life; HE too is allowed to appoint his deputy, who is the man that puts wafers into our boxes, and papers into our drawers, and who hands us our letters in the cleft of a stick.—But nevertheless, I would have their Lordships take care how they go into the Court of King's Bench, which, it seems, is this man's CASTLE.—If Mr. Hewitt were to make a noise and disturb the Court, and Lord Kenyon were to order him to be pushed out, I suppose we should have his Lordship indicted at the next assizes for a riot.—Suppose any of the Judges wishes to inspect a record in the Treasury Chamber, and the clerk should not only refuse the key, but maintain his possession with pistols; would any man in his senses argue that it was either indictable or indecent to thrust him out into the street—yet, where is the difference between the attendants on a court civil, and a court ecclesiastical? Where is the difference between the Keeper of the Records of the Court of King's Bench, or Common Pleas, and the Registrar of the Consistory of Bangor?

To all this I know it may be answered, That these observations (supposing them to be well founded) only establish the Bishop's right of entry into his office, and the illegal act of the Prosecutor in taking an exclusive possession; but that they do not vindicate the Bishop for having first taken off the lock in his ab-

sence, nor for afterwards disturbing him in the possession which he had peaceably regained; that the law was open to him, and that his personal interference was illegal.

To settle this point, we must first have recourse to facts, and then examine how the law applies to them.

It stands admitted, that though Mr. Grindley knew that the Bishop had determined his will, and had insisted on his surrender of his situation, which he never held but by the Bishop's sufferance, he absolutely refused the key, with the design to exclude him from the office. It was not till *then*, that the Bishop, having no other means of access, ordered the lock to be taken off, and a new key to be made. Now, whether this act of the Bishop's was legal or illegal, is wholly beside the question — his Lordship is not charged with any force or illegality on *that* account; he is not accused even in the Counsel's speech, with any impropriety in this proceeding, except an intrusion into this imaginary castle of Mr. Grindley. It is admitted, in short, that the Bishop took a possession *altogether peaceable*.

His Lordship then, having removed the Deputy Registrar, without due authority, if you please, and being (if you will, for any thing which interests my argument) in possession, contrary to law, let us see what follows. — And in examining this part of the evidence, *upon which, indeed, the whole case depends*, I am not driven to the common address of a Counsel for a Defendant in a criminal prosecution; I am not obliged to entreat you to suspend your judgments till you hear

the other side—I am not anxious to caution you to withhold implicit credit from the evidence, till the whole of it is before you.—No, Gentlemen—I am so far from being in that painful predicament, that though I know above half of what you have heard is not true; although I know that the transaction is distorted, perverted, and exaggerated in every limb and member; yet I desire that you will take it as it is, and find your verdict upon the foundation of its truth.—Neither do I desire to seduce your judgments, by reminding you of the delicacy of the case.—My Friend declares he does not know you personally, but that he supposes you must have a natural sympathy in protecting a person in the Bishop's situation against an imputation so extremely inconsistent with the character and dignity of his order.—It is natural, as decent men, that you should; and I, therefore, willingly second my Learned Friend in that part of his address.—I solemnly conjure you also to give an impartial judgment—I call upon you to convict, or acquit, according to right and justice.—God forbid, that you should not!—I ask no favour for my Client because he is a prelate, but I claim for him the right of an English subject, to vindicate his conduct under the law of the land.

The Bishop, then, being in peaceable possession, what is the conduct of the Prosecutor, even upon his own confession?—He sends for three men; two of whom he calls domestics; one of them is his *domestic blacksmith*.—He comes with them, and others, to the office, with PISTOLS, and provided with POWDER AND SHOT.—Now, *quod animo* did they come?—I was really

so diverted with the nice distinction of Mr. Grindley, in his answer to this question, that I could scarcely preserve my gravity.—He said, “I came, it is true, “with pistols, and with powder and shot, to take possession; but—mark—I did not *load* my pistols in “order to *take* possession—I did not load them till “*after* I had it, and then only to *keep* the possession I “had peaceably taken.” This would be an admirable defence at the Old Bailey.—A man breaks into my house in the day, to rob me of my plate*—(this is but too apt a quotation, for so I lost the whole of it)—But this felon is a prudent man, and says to himself—I will not *load* my fire-arms till I have got into the house and taken the plate, and then *I will load them*, to defend myself against the owner, if I am discovered.—This is Mr. Grindley’s law;—and, therefore, the moment he had forced the office, he loaded his pistols, and called aloud repeatedly, that he would blow out the brains of the first man that entered.—A pistol had before been held to the breast of one of the Bishop’s servants; and things were in *this* posture when the Bishop came to the spot, and was admitted into the office.—The lock which he had affixed he found taken off, the doors forced open, and the apartment occupied by armed men, threatening violence to all who should oppose them.

THIS IS MR. GRINDLEY’S OWN ACCOUNT.—He admits, that he had loaded his pistol *before the Bishop came*; that he had determined to stand, *vi et armis*, to

* It seems Lord Erskine’s house, in Serjeant’s Inn, had been recently broken open, and his plate all stolen.

maintain possession by violence, and by death if necessary ; and that he had made that open declaration in the hearing of the Bishop of the diocese.—Perhaps Mr. Grindley may wish, hereafter, that he had not made this declaration so public ; for, whatever may be the *Bishop's* forbearance, yet the criminal law may yet interpose by other instruments, and by other means.—Indeed, I am truly sorry to be discussing this matter for a *Defendant in July*, which ought to have been the accusation of a *Prosecutor six months ago*, if the public peace of the realm had been duly vindicated.

The Bishop, then, being at the door, and hearing his office was taken possession of by force, and by the very man whom he had displaced, the question is, Did he do *more* than the law warranted in that conjuncture ?—I maintain, that, from over-forbearance, he did *much less*.—If in this scene of disorder the records of the diocese had been lost, mutilated, or even displaced, the Bishop, if not legally, would at the least have been morally responsible. It was his duty, besides, to command decency within the precincts of his church, and to remove at a distance from it all disturbers of the peace.—And what, after all, did the Bishop do ?—He walked up and down, remonstrating with the rioters, and desiring them to go out, having before sent for a magistrate to act according to his discretion. It is true, Mr. Grindley worked himself up to say, that the Bishop held up his fist so (*describing it*) ; but, with all his zeal, he will not venture to swear he did so with a *declaration*, or even with an *appearance*, of an intention to strike him.—The whole, that he can screw up

his conscience to is, to put the Bishop in an attitude, which is contradicted by every one of his own witnesses—who all say, that the Bishop seemed much surprised, and walked to and fro, saying, “This is fine work!”—and moving his hands backwards and forwards, thus (*describing it*). Does this account at all correspond with Mr. Grindley’s? or does it prove an attitude of force, or even an expression of passion? On the contrary, it appears to me the most natural conduct in the world. They may fancy, perhaps, that they expose the Bishop when they impute to him the common feelings, or, if you please, the indignation of a MAN, when all order is insulted in his presence, and a shameless outrage committed in the very sanctuary which he is called upon, by the duty of his office, and the dignity of his station, to protect.—But is it required of any man, either by human nature, or by human laws (whatever may be the sanctity of his character), to look at such a proceeding unmoved? Would it have been wrong, or indecent, if he had even FORCIBLY removed them? I SAY, IT WAS HIS DUTY TO HAVE DONE SO, WHOEVER WERE THE OFFENDERS; whether the Deputy Registrar, the Registrar himself, or the highest man in the kingdom.

To come at once to the point: I maintain, that, at the time the Bishop came to the door, at which very moment Grindley was threatening to shoot the first person that entered, which made somebody say, “Will you shoot the Bishop?”—I maintain, at that very moment THREE indictable offences were committing, which put every man upon the level of a magistrate,

with regard to authority, and even prescribed a duty to every man to suppress them. In the first, there was AN AFFRAY; which my Friend did not define to you, but which I will.—Mr. Serjeant Hawkins, transcribing from the ancient authorities, and whose definition is confirmed by every day's practice, defines an affray thus: "It is an affray, though there is neither actual " violence, nor threat of violence, where a man arms " himself with dangerous weapons in such a manner " as will naturally cause terror;"—and this was always an offence at common law, and prohibited by many statutes.

Let us measure Mr. Grindley's conduct, upon his own account of it, by the standard of this law, and examine whether he was guilty of an affray. He certainly threatened violence; but I will throw him *in* that, as I shall examine his threatening when I present him to you in the character of a rioter.—I will suppose, then, that he threatened no violence; yet he was armed with dangerous weapons in such a manner as would naturally create terror.—He tells you, with an air of triumph, that he brought the arms for that express purpose, and that he dispersed those who came to disturb him in his CASTLE. He was, therefore, clearly guilty of an affray.

Let us next see what the law is, as it regards all the King's subjects, when an affray is committed. The same authorities say,—(*I read from Mr. Serjeant Hawkins, who collects the result of them.*) "That "any private man may stop and resist all persons "engaged in an affray, and remove them: that if he

“ receive a hurt in thus preserving the peace, he may
“ maintain an action for damages ; and that, if he
“ unavoidably hurt any of the parties offending in
“ doing that which the law both allows and com-
“ mends, he may well justify it, for he is no ways in
“ fault.”—Setting aside, therefore, the office and au-
thority of the Bishop, and the place where it was com-
mitted, and considering him only as a private subject,
with no power of magistracy, he had a right to do—
not that which he did (*for in fact he did nothing*)—
he had a right to remove them by main force, and to
call others to assist in removing and securing them.
The Bishop, however, did neither of these things ; he
took a more regular course—he sent for a magistrate
to preserve the peace—he had, indeed, sent for him
before he came himself ; yet, they would have you be-
lieve, that he went there for an illegal purpose—as if
any man who intended violence, would send for a
magistrate to witness the commission of it. When the
magistrate came, Mr. Grindley thought fit to behave a
little more decently ; and so far was the Bishop from
acting with passion or resentment, that when those
about him were desirous of interfering, and offered
their services to turn them out, he said to them :
“ No ! let the law take its course in due season.”—
His Lordship, by this answer, showed a greater regard
for peace than recollection of the law ; for the course
of the law *did* warrant their forcible removal ; instead
of which, he left the Prosecutor, with arms in his
hands, in a possession, taken originally by force, and
forcibly maintained.

Let us next examine if the Prosecutor, and his witnesses, were engaged in a riot.—My Learned Friend will forgive me if I remind him, that there is one part of the legal definition of a riot, which he omitted.—I will, therefore, supply the omission from the same authorities.—“A riot is, where three persons, “or more, assemble together with an intent, mutually, “to assist one another against any who shall oppose “them in the execution of some enterprise of a private nature, and afterwards actually execute the “same in a turbulent manner, to the terror of the “people, whether the act intended be legal or illegal.” But the same authorities add very properly—“It is “clearly agreed, that in every riot there must be some “such circumstances, either of actual force and violence, or of an apparent tending to strike terror into “the people, because a riot must always be laid *in terrorem populi*.”—This most important part of the definition of a riot, which my Friend prudently omitted, points, directly and conclusively, upon the conduct of *his own* Client, and completely excludes *mine*.—The Prosecutor, and his witnesses, *did* assemble mutually to support one another, and executed their purpose *with arms in their hands, and with threats and terror*; which conclusively constitutes a riot, whether he was Registrar, or not, and whatever might be his right of possession.—The Bishop, on the other hand, though he might have no right to remove the Prosecutor, nor any right to possession, could not possibly be a rioter, for he came *without violence or terror, or the means of either*, and, if he had employed them, might lawfully

have used them against those who were employing both.

Let us now further examine, whether I was right in maintaining, that there was an aggravation, from the *place* where the offence was committed, and which invested the Bishop with a distinct character and authority.

By the statute of Edward the Sixth, if persons come tumultuously within the consecrated precincts of the church, the Ordinary has not only a right to repress them, but he may excommunicate the offenders ; who are, besides, liable to a severe and ignominious temporal punishment, after a conviction on indictment, even for an indecent brawling within the precincts of the church, without any act at all, which would amount to a riot or an affray.

Let us then, for a moment, reflect, how these solemn authorities, and any possible offence in the Reverend Prelate, can possibly be reconciled ; and let us contemplate, also, the condition of England, if it be established as a precedent upon the fact before you, that he is amenable to criminal jurisdiction upon this record. A riot may arise in the street, the moment after your verdict is pronounced, by persons determined to take and to maintain some possession by force. I may see or hear armed men threatening death to all who shall oppose them ; yet I should not venture to interpose to restore the peace, because I cannot try their titles, nor examine to which of the contending parties the matter in controversy may belong.—If this new doctrine is to be established, ask yourselves this question—Who will

in future interfere to maintain that tranquillity, which the magistrate may come too late to preserve, if the rein is given to disorder in the beginning? Although dangerous violence may be committing, though public order may be trampled down within his view, a wise man will keep hereafter within the walls of his own house. Though fearless of danger to his *person*, he may yet justly fear for his *reputation*, since, if he only asks what is the matter, and interposes his authority or counsel, he may be put by the rioters into an attitude of defiance, and may be subjected to the expense and degradation of a prosecution! The delicate situation of the Bishop, at this moment criminally accused before you, is admitted; but it is hardly more, Gentlemen, than would attach upon persons of many other descriptions. The same situation would not be much less distressing to a Judge, to a Member of Parliament, or to any of you, Gentlemen, whom I am addressing. What would be the condition of the Public, or your own, if you might be thus dragged to the Assizes as rioters, by the very rioters which your duty had driven you to offend? I assert, that society could not exist for an hour, if its laws were thus calculated to encourage its destroyers, and to punish its protectors.

Gentlemen, there is no man loves freedom better than I do; there is no man, I hope, who would more strenuously oppose himself to proud and insolent domination in men of authority, whether proceeding from ministers of the church, or magistrates of the state.— There is no man, who would feel less disposed to step beyond my absolutely imposed duty as an advocate, to

support oppression, or to argue away the privileges of an Englishman.—I admit, that an Englishman's house is his castle; and I recollect and recognize all the liberties he ought to enjoy.—My Friend, and I, are not likely to differ, as to what an Englishman's freedom consists in. The freedom that HE and I, love and contend for, is THE SAME. It is a freedom that grows out of, and stands firm upon, THE LAW—it is a freedom, which rests upon the ancient institutions of our wise forefathers—it is a freedom which is not only consistent with, but which cannot exist without, public order and peace—and, above all, it is a freedom, cemented by morals, and still more exalted by a reverence for religion, which is the parent of that charity, humanity, and mild character, which has formed, for ages, the glory of this country.

Gentlemen, my Learned Friend takes notice, that this cause has been removed from its primitive tribunal, in order to be tried before you at Shrewsbury. He tells you, he never saw the affidavit that was the foundation of its removal; which, however, he with great propriety supposes contained matter which made it appear to Lord Kenyon to be his duty to withdraw the trial from its proper forum in Wales.—But, he is instructed by Mr. Grindley to deny that any thing was done, either by himself, or any other person connected with him, to prejudice that tribunal, or the country which was to supply it.—I, on the other hand, assert, that, upon the Prosecutor's *own evidence*, greater injustice and malice never marked any judicial proceeding. I have in my hand a book (no matter by

whom written) circulated industriously through all Wales, to prejudice the public mind upon the very question before you. But Mr. Grindley, it seems, is not responsible for the acts of this anonymous libeller. How far he is responsible, it is for you to judge. It is for you to settle, how it happened that the author of this book should have it in his power, minutely to narrate every circumstance which Mr. Grindley has himself been swearing to; and that he should happen, besides, to paint them in the very *same* colours, and to swell them with the *same* exaggerations, with which they have been this morning accompanied. It will be for *you* to calculate the *chances* that should bring into the same book, under inverted commas, a long correspondence between the Bishop of Bangor and this very person. Gentlemen, he admits, upon his oath, "that he furnished the materials from whence that part of the work, at least, might have reached the author;" and from thence it will be for you to guess, what share he had in the remainder. All I know is, that from that time forward the Bishop's character has been torn to pieces, not from this pamphlet alone, but by a pestilential blast of libels, following one another; so that it has been impossible to read a newspaper, without having announced to us this miserable cause, and the inquiries forsooth to be instituted in Parliament, which were to follow the decision. Gentlemen, the same spirit pursues the cause even into *THIS PLACE*,—proceeding from the same tainted source. My Friend tempers his discourse with that decorum and respect for religion, which is inseparable from the lips of so

good a man. He tells you, that it has been wittily said of the clergy, and his Client desires him to add, "truly too"—that the clergy have found what Archimedes wished for in vain—"a fulcrum, from whence "to move the world;" he tells you, "that it is recorded of that great philosopher, that he desired but "to have a fulcrum for his engine, to enable him to "accomplish it." "Churchmen," says Mr. Grindley, by the mouth of Mr. Adam, who cannot abandon him, and who, as a sort of set off against *his own* honour and moderation, is obliged to inhale the spirit of his Client, "The church," says Mr. Grindley, "has "found this fulcrum in the other world, and it is by "playing off *that* world, they enthrall the world we "live in." He admits, indeed, that when they employ their authority to enforce the true purposes of religion, they have a right to that awful fulcrum upon which their engine is placed, and then their office will inspire reverence and submission; but when they make use of it for the lowest and most violent purposes, for ends destructive alike to religion and civil society (*of course the purposes in question*), THEN it seems it is, that disgrace not only falls upon its individuals, but destruction overtakes the order.

My Learned Friend, by his Client's instruction, then immediately applies this general reflection, and says, "that he can discover no other reason, why the "Bishop would no longer permit Mr. Grindley to "hold the office, than that he had deviated from his "celestial course—had looked to the vile and sordid "affairs of the world, and prostituted the sacred dig-

"nity of his character to purposes which would
"degrade men in the lowest situations."—My Friend
said, across the Court, that he had never seen the
pamphlet. Good God! I believe it.—But *I* have
seen it; and I have no doubt that one half of it is
copied into his brief: it is written in this very spirit—
it brings before the Bishop the events of France—it
warns him of the fate of his brethren in that country,
as an awful lesson to ecclesiastics of all ranks and de-
nominations, and *reminds* him, that 18 archbishops,
118 bishops, 11,850 canons, 3000 superiors of con-
vents, and a revenue of fifteen millions sterling, were
on a sudden swept away. [*Mr. Erskine here read an
extract from the pamphlet, and then continued:*]

Gentlemen, all this is mighty well; but he must be
but little acquainted with the calamities of France, who
believes that this was the source of them. It was from
no such causes that those horrors and calamities arose,
which have disfigured and dishonoured her revolution,
and which have clouded and obscured the otherwise
majestic course of freedom;—horrors and calamities
which have inspired an alarm into many good men,
and furnished a pretext for many wicked ones, in our
own country. It was the profligacy and corruption of
the French STATE, and not the immorality of her
CLERGY, which produced that sudden and extraordinary
crisis, in the vortex of which the church, and almost
religion itself, were swallowed up. The clergy o
France was pulled down *in the very manner of this
pamphlet*. A trumpet was blown against their order
—the Massacre of St. Bartholomew was acted upon

the stage, and the Cardinal of Lorraine introduced upon it, exciting to murder, in the robes of his sacred order. It was asked by a most eloquent writer* (with whom I do not agree in many things, as I do in this), whether this horrid spectacle was introduced to inspire the French people with a just horror of blood and persecution?—and he answers the question himself by saying, that it was to excite the indignation of the French nation against RELIGION AND ITS OFFICES; and that it had its effect: “That, by such means, the
 “ Archbishop of Paris, a man only known to his flock
 “ by his prayers and benedictions, and the extent of
 “ whose vast revenues could be best ascertained by his
 “ unexampled charity to the unhappy, was to be
 “ hunted down like a wild beast, merely because the
 “ Cardinal of Lorraine, in the sixteenth century, had
 “ been a rebel and a murderer.”

In the same manner, this pamphlet, through the medium of abuse upon *the Bishop of Bangor*, is obviously calculated to abuse the minds of the lower orders of the people against the CHURCH; and to destroy the best consolation of human life, by bringing the sanctions of religion into doubt and disrepute. I am, myself, no member of the church of England, nor do I know that my Friend is—we were both born in another part of the island, and educated in other forms of worship; but we respect the offices of religion, in whatever hands they are placed by the laws of our country: and certainly the English clergy never stood higher than they do to-day, when Mr. Adam, so tho-

* Mr. Burke.

roughly acquainted with the history of his country, as far as it is ancient, and who, from his personal and professional connexions, is so perfectly acquainted with all that passes in the world of our own day, is drawn back to the times of Laud and Wolsey, to search for English prelates, who have been a reproach to the order; and when he would represent tyranny and oppression in churchmen, is forced back upon an unreformed church, and to ages of darkness and superstition, because it would have been in vain to look for them under the shadow of that mild religion which has promoted such a spirit of humanity, and stamped such a character upon our country, that if it should ever please God to permit her to be agitated like neighbouring nations, the happy difference would be seen between men who reverence religion, and those who set out with destroying it. The BISHOPS, besides (to do them common justice), are certainly the *last* of the clergy that should be attacked. The indulgent spirit of reformed Christianity, recollecting that, though invested with a divine office, they are men with human passions and affections, permits them to mix in all the customary indulgences, which, without corrupting our morals, constitute much of the comfort and happiness of our lives; yet, they in a manner separate themselves from their own families; and, whilst the other orders of the clergy, even the most dignified, enjoy (without being condemned for it), the amusements which taste and refinement spread before us, no Bishop is found within these haunts of dissipation. So far from subjecting themselves to be brought to the assizes for riot

and disorder, they thus *refuse many of the harmless gratifications*, which, perhaps, rather give a grace and ornament to virtue, than disfigure the character of a Christian ; and I am sure, the Reverend Prelate, whom I represent, has never overstepped those limits, which a decorum, perhaps overstrained, has by custom imposed upon the whole order. The Bishop's individual character, like every other man's, must be gathered from his life, which, I have always understood, has been eminently useful and virtuous. I know he is connected with those, whose lives are both ; and who must be suffering distress at this moment from these proceedings. He is nearly allied to one,* whose extraordinary knowledge enables him to fulfil the duties of a warm benevolence, in restoring health to the sick, and in bringing back hope and consolation along with it to families in the bitterness of affliction and distress. I have, more than once, received that blessing at his hands, which has added not a little to the anxiety which I now feel.

Gentlemen, I am instructed, and indeed pressed, by the anxiety of the Bishop's friends, to call many witnesses, to show, that he was by no means disturbed with passion, as has been represented, and that, so far from it, he even repressed those, whose zeal for order, and whose affection for his person, prompted them to interfere ; saying to them, " The law will interpose in " due season." I have witnesses, to a great number, whom I am pressed to call before you, who would contradict Mr. Grindley in the most material parts of his

* The celebrated Dr. Richard Warren.

testimony; but then I feel the advantage he would derive from this unnecessary course; he would have an opportunity, from it, to deprive the Reverend Prelate of the testimony and protection of your approbation. He would say, no doubt, "Oh, I made out the case which vindicated my Prosecution, though it was afterwards overturned by the testimony of persons in the Bishop's suite, and implicitly devoted to his service;—I laid facts before the Jury, from which a conviction must have followed, and I am not responsible for the false glosses by which *his witnesses have perverted them.*" This would be the language of the Prosecutor; and I am, therefore, extremely anxious that your verdict should proceed *upon the facts as they now stand before the Court*, and that you should repel, with indignation, a charge which is defeated by the very evidence that has been given to support it. I cannot, besides, endure the humiliation of fighting with a shadow, and the imprudence of giving importance, to what I hold to be *nothing*, by putting *any thing* in the scale against it; a conduct which would amount to a confession that *something* had been proved which demanded an answer. How far those, from whom my instructions come, may think me warranted in pursuing this course, I do not know; but the decision of that question will not rest with either of us, if your good sense and consciences should, as I am persuaded they will, give an immediate and seasonable sanction to this conclusion of the trial.

Mr. ERSKINE, after consulting a few minutes with Mr. Plumer, Mr. Leycester, and Mr. Milles, informed the Court he should give no Evidence.

Mr. Justice HEATH then summed up as follows; which we insert, as the Learned Judge stated the substance of all the Evidence given on the Trial.

MR. JUSTICE HEATH.

GENTLEMEN OF THE JURY,

This is an Indictment against the Bishop of Bangor, Hugh Owen, John Roberts, John Williams, and Thomas Jones. The Indictment states, "That Samuel Grindley (who, it seems, is the Prosecutor of this Indictment), on the 8th of January last, was Deputy Registrar of the Episcopal and Consistorial Court of the Bishop of Bangor, and that, in right of his office, he had the use of a room adjoining to the cathedral church of Bangor, called the Registrar's Office, for transacting the business of his office: that the Defendants, intending to disturb the Prosecutor in the execution of his office of Deputy Registrar, on the 8th of January last, riotously assembled and unlawfully broke the Registrar's Office, and remained there for an hour, and continued making a great disturbance, and assaulted the Prosecutor, and stirred up a riot."

This, Gentlemen, is the substance of the Indictment. The definition of a riot has been truly stated to you ; it may be collected, indeed, from the Indictment itself ; and is, when two or more persons assemble together with an intent mutually to assist each other, and to resist all those who should oppose them, and with a further intent to break the peace ;—and it is likewise for a private purpose.

Now, before I sum up the evidence, I shall state those things particularly, to which you should direct your attention ; and you will consider how the evidence applies in support of the Indictment. It must be proved, to your satisfaction, that the Prosecutor is Deputy Registrar of this Consistorial Court of the Bishop of Bangor ; that, in right of that office, he had the use of this room to transact his business there ; that the Defendants, intending to disturb him in his office, riotously assembled to disturb the peace, and broke and entered the office-room, and continued there, making a great disturbance, asserting that he had assumed an office which did not belong to him, and making a riot there. These things must be proved to your satisfaction. I will comment upon the evidence as I shall state it to you.

Samuel Grindley, the Prosecutor, tells you, that in February 1792, he was appointed Agent to the Bishop of Bangor, and that he afterwards held the office of Deputy Registrar, under Mr. Gunning, who, it seems, was a minor ; that he saw Mr. Gunning, the Registrar, in October 1794 ; that he paid seventy pounds a year to the Bishop, on account of Mr. Gunning his princi-

pal ; that the Bishop was the person who made the bargain between him and his principal ; that he entered on his office as Deputy. He says, that he was invited by the Bishop, and that the Bishop introduced him (the Prosecutor) to Mr. Gunning, as the Principal Registrar, and introduced the Principal Registrar to the witness as his Deputy. He says, that there was no complaint that he had not discharged the duties of his office ; and that he continued to discharge the duties of his office till the 22d of February last. He says, that there is an apartment belonging to this office, which, it seems, is under the chapter-house adjoining to the cathedral ; that there is a flight of steps going up to it ; that he employs his Clerks in the office, and he has a resident Clerk there. He says, he told the Bishop that he would resign on the 22d of February last ; that on the 4th of January he was absent from Bangor, and returned on the 7th, having received information that his office had been broken open ; that the Bishop afterwards acknowledged to him, that it had been broken open by his (the Bishop's) servants, under his direction. He says, that some panes of glass had been taken down, the leads had been removed, and fresh locks had been put upon the doors. All this the Bishop acknowledged. And then he gives you an account of his coming there ; of his breaking open the door, and his entering again.

Let us consider, so far as this, how it applies. In the first place, it certainly does not lie in the mouth of the Bishop to say, that this man was not properly appointed to his office ; he was in the exercise of his office ;

he had made an agreement with his principal, and he paid him seventy pounds a year—the Bishop was the person who negotiated the business; and he gave the Bishop notice that he meant to give up his office on the 22d of February; but you see, between the 4th and the 7th of January, before the time the Prosecutor had appointed for resigning his office, the Bishop thought proper to go to the office and break open the lock, and then, it is contended on the part of the Defendants, that the Bishop was in peaceable possession; it is contended too, that, as Bishop, he had a jurisdiction in this cathedral—that, because the Deputy Registrar must be confirmed by the Bishop, the Prosecutor is only tenant at will to the Bishop; that he never had a legal appointment, and, therefore, the Bishop had a power of dismissing him.

Now, in the first place, supposing it to be proved, that the Bishop had a power of dismissing him (which does not appear one way or the other), it does not follow from thence, that he ought to do it by force or violence—he ought to do it by process of law. It happens in this country, that the Lord Chief Justices of the Courts of King's Bench and Common Pleas have a right of appointing officers;—the Judges attending the Court at the Old Bailey, have a right of appointing the officers there;—and questions have frequently arisen concerning this power of appointment, whether rightfully or wrongfully exercised. What is the mode of deciding it? Each party appoints his officer, and then one brings his action, and it is determined by due course of law. If the Bishop had a right of dispos-

sessing this man, which does not appear to me, because, though the appointment of a Deputy might not be good without the approbation of the Bishop, it does not follow from thence, that the Bishop had a right to withdraw that approbation and that confirmation, after it was given. Whether he can, or cannot, is a question I am not prepared to decide, and it is immaterial to the present question; it is enough to say, that if the Bishop had that right and that power, it behoved him to have caused Mr. Gunning to have appointed another Deputy, and then that Deputy ought to have tried the right.—The question then is, was the Bishop in peaceable possession? *No man is in peaceable possession of any place which he comes to by force and violence*; the Bishop exercised force and violence in *this* respect, in breaking the lock, and in putting on a new lock; therefore, the force and violence was on the part of the Bishop;—he was never in peaceable possession of this place, nor could he have a right to come and put this lock upon the door.

Let us pursue this matter by steps.—The Prosecutor said, he came armed with pistols; that was, I think, improper; he ought not to have armed himself with pistols in that fashion.—He broke open the lock, and he entered; *that* was not improper; he being in possession of this office, it was lawful for him to do so.—Then, it seems, a Mr. Rasbrook came, who is a person exercising some office under the Bishop, his house-steward, I think; he came, and the Prosecutor presented a pistol to him—that was highly improper. A man has a right to arm himself, and to assemble his

friends in defence of his house ; but the law allows no *more* ; because the house is his sanctuary, he is not to arm himself, and assemble his friends in defence of his close ; but ought to have recourse to legal means, if he is injured ; and, therefore, the Prosecutor certainly acted with a greater degree of force and violence, in that respect, than he ought to have done. But then that was no legal excuse for the Bishop's coming afterwards in the manner he did. The Prosecutor's presenting a pistol to Rasbrook, could be no inducement to the Bishop, and the other Defendants, because they were not present, and their passions were not provoked by it.

The Bishop, in this case, Gentlemen, seems to have laboured certainly under two very great errors.—First of all, that he had a right to remove the Prosecutor ; and, secondly, that he had a right to remove him by *force and violence*.—Then these persons were removed out of the office ; the outer door was secured, by some means, by the Prosecutor, and the several persons with him.—It is said that they were guilty of a riot.—I think, certainly, they were guilty of no riot *at this time* ; they were guilty of a misdemeanor in arming themselves, but they stood merely upon the defensive.—No person, as I told you before, is justified in arming himself and his servants to defend his close ; but if he does arm himself and his servants to defend his close, and opposes no person without the close, then he is guilty of no riot whatever.

The question is, whether or no they are guilty of such a breach of the peace—of an act of so much force

and violence, as to constitute a riot.—When there was a knocking at the door, the Prosecutor said he would shoot any one who should enter ; which, I said before, he was not warranted in doing. Being told the Bishop was there, he said he would treat him with all possible respect, and he opened the door and admitted him and his followers ; and then, he says, he loaded another pistol.—He tells you, the Bishop entered in a great rage. Whether there was any rage or passion, or no, is only material to show whether or no the rest of the story is probable ; because, his being in a rage, does not prove him guilty of a breach of the peace. The question is, whether he has committed any acts in breach of the peace?—First of all, the Prosecutor tells you, that he told the Bishop he should behave with proper respect to him, but he should not leave the office—he swears that the Bishop took hold of him ; and afterwards he went to William Roberts, an husbandman belonging to the witness—he then went to another servant, Robert Davis, and attempted to pull him out ; that the Bishop returned to William Roberts, collared him, and drew him towards the door ; that the Bishop went with his hands clenched towards the witness ; and the witness describes the manner in which he (the Bishop) went towards him.—Now his taking hold of the witness IS AN ASSAULT.—He says, he attempted to pull him out ; his seizing hold of him IS AN ASSAULT ; his returning to William Roberts, and collaring him, and pushing him towards the door, IS ANOTHER ASSAULT ; his going with his hands clenched towards him in a menacing way, if he

were near enough to strike him, would be an assault ; if not near enough to strike him, it would not be an assault ; and then he called to his servants to come and pull him out—that is a breach of the peace, coming and removing them all by force and violence.

Then there is that which passes in respect to Mr. Roberts. — The Prosecutor and the other witnesses tell you, that Roberts was in a great rage ; he cannot say whether he entered before or after the orders given by the Bishop ; that he clenched his fist, and said, “ If nobody will turn him (meaning the Prosecutor) out, I will do it.”—The Bishop said, the Prosecutor had pistols ; upon which Roberts said, in an outrageous manner, “ Do not shoot the Bishop, shoot me ;” and said, that if nobody else would turn the Prosecutor out, he would.—He asked the Prosecutor to go on one side with him, into the churchyard, and said, he was not afraid of him in any place. The witness said, he had something else to attend to ; and another of the witnesses said, he promised to meet him at some other time and place. This is, you see, a challenge by Roberts to fight the Prosecutor ; why, that is a breach of the peace. The Bishop is present ; he is the person who tells Roberts that the Prosecutor had pistols ; then the Bishop hears this challenge. They all came upon one design. When several persons come upon an illegal design or purpose, the act of one, especially if in the presence of all, is the act of all.

This, Gentlemen, is the sum of the evidence on the *one side* ; and there is *no* evidence on the *other*.

The Bishop, no doubt, is a man of an excellent cha-

racter ; but at this moment he gave way to his temper. He ought to have followed the process of the law, and not so to have done. Thus much I have said affects the Bishop, and affects Roberts. As to Owen, the Prosecutor says that Owen came into the office ; he made a noise ; he talked very loud. The witness told him, if he had any business, he was there ready to transact it, otherwise he begged they would go about their business. He only speaks to his making a noise. John Williams, he says, was less noisy than the rest. The witness asked what business he had there ; and told him to go about his business. He says, he staid there against his will ; he staid after the rest went away.

Upon this it is necessary for me to state, as I did before, that the other Defendants coming with the Bishop upon the same design, by force and violence to dispossess the Prosecutor, undoubtedly they came with an unlawful intent and purpose ; *and, if you believe these witnesses*, they were guilty of the several breaches of the peace which I have stated, in assaulting the Prosecutor, in assaulting David Roberts, in assaulting William Roberts, and in the Defendant Roberts challenging the Prosecutor ; if you believe these witnesses, it seems to me that the Defendants are guilty of the riot with which they stand charged. As for the force and violence which the Prosecutor made use of, all that may be urged in another place in mitigation of the punishment ; it is only for you to determine whether they, or each of them, are guilty of this riot.

Mr. Erskine.—The two last witnesses stated a direct contradiction.

Mr. Justice Heath.—The law is clear and plain; you will apply the law to the facts as I have stated them. You may banish all prejudices that you may have from all publication. It is, indeed, unnecessary to admonish Gentlemen of your enlightened understandings; but at the same time, considering that individuals are to be tried by the law of the land, if they are guilty, notwithstanding the high character they may deservedly have, down to this time, it is your duty to find them guilty. *If you have any reasonable doubt whether they are guilty,*—in that case you will acquit the Defendants.

In about five minutes the Jury acquitted all the Defendants.

S P E E C H

FOR THE

REV. GEORGE MARKHAM,

AGAINST

JOHN FAWCETT, ESQ.

FOR

CRIMINAL CONVERSATION WITH THE PLAINTIFF'S WIFE,

BEFORE THE DEPUTY SHERIFF OF MIDDLESEX,

AND A SPECIAL JURY,

UPON AN INQUISITION OF DAMAGES.

PREFACE.

NONE of the pleadings of Lord Erskine when at the Bar, excited a greater interest, or were attended with a greater success, than those (and they were most numerous) in cases of Adultery. His assistance was so generally sought after, that, except in a very few instances, he was always secured by the retainers of complainants—so that, with the exception of the case of Howard against Bingham, now Earl of Lucan, in the present volume, the case of Eston against the late Duke of Hamilton, where the phrase of the “Loose Fish” made so conspicuous an appearance—and a cause of Baldwin and Oliver, in which he attended at York Assizes, and where the Jury found a shilling damages, we do not recollect any of his Speeches *for* adulterers in mitigation of damages. It was, perhaps, in consequence of that circumstance, that it became the fashion to attribute to the period when Lord Kenyon was Chief Justice of the King’s Bench, and Lord Erskine was at the Bar in that Court, a greater number of verdicts in cases

of adultery, with severe damages, than could be altogether vindicated, either by precedent or by the mild spirit of our judicial proceedings; but, after the best attention we have been able to give to the subject, in considering of a fit preface for the only two correct Speeches which we are at *present* possessed of on that subject, the observation appears to be without due foundation.

Adultery, when attended with all the circumstances of aggravation which mark the following case of the Rev. Mr. Markham (and there were many others in Lord Erskine's time of a similar description), is unquestionably the greatest civil injury which man can commit against man; and the manner in which the subject is treated in the Speech which follows, deserves the serious attention of every person who is not lost to all consideration of human comfort and happiness. With regard to the facts, no preface is necessary.—They are all detailed in Mr. Erskine's Speech for the Plaintiff; and no evidence was offered on the Defendant's part, who had let judgment go by default. The Inquisition was taken upon the 4th of May, 1802, before the Sheriff of Middlesex and a Special Jury, at the King's Arms Tavern, in Palace Yard, Westminster, at six in the evening, after the business of the Courts at Westminster had finished.

The Jury found a verdict with seven thousand pounds damages, which we have been informed were never levied, the Defendant having left the kingdom.

SPEECH FOR THE PLAINTIFF.

MR. SHERIFF, AND GENTLEMEN OF THE JURY.

In representing the unfortunate Gentleman who has sustained the injury which has been stated to you by my Learned Friend, Mr. Holroyd, who opened the pleadings, I feel one great satisfaction—a satisfaction founded, as I conceive, on a sentiment perfectly constitutional.—I am about to address myself to men whom I PERSONALLY KNOW;—to men, honourable in their lives,—moral,—judicious; and capable of correctly estimating the injuries they are called upon to condemn in their character of Jurors. THIS, Gentlemen, is the only country in the world, where there is such a tribunal as the one before which I am now to speak: for, however in other countries such institutions as our own may have been set up of late, it is only by that maturity which it requires ages to give to governments—by that progressive wisdom which has slowly ripened the Constitution of our country, that it is possible there can exist such a body of men as you are. It is the great privilege of the subjects of England that they judge one another.—It is to be recollected, that, although we are in this private room, all the sanctions of justice are present. It makes no manner of difference, whether I address you in the presence of the Under-Sheriff, your respectable Chairman, or with the assistance of the highest magistrate of the state.

The Defendant has, on this occasion, suffered judg-

ment by default :—*other* adulterers have done so before him. Some have done so under the idea, that, by suffering judgment against them, they had retired from the public eye—from the awful presence of the Judge; and that they came into a corner where there was not such an assembly of persons to witness their misconduct, and where it was to be canvassed before persons, who might be less qualified to judge the case to be addressed to them.

It is not long, however, since such persons have had an opportunity of judging how much they were mistaken in this respect: the largest damages, in cases of adultery, have been given in this place.—By this place, I do not mean the particular room in which we are now assembled, but under inquisitions ordered by the Sheriff; and the instances to which I allude, are of modern, and, indeed, recent date.

Gentlemen, after all the experience I have had, I feel myself, I confess, considerably embarrassed in what manner to address you. There are some subjects that harass and overwhelm the mind of man.—There are some kinds of distresses one knows not how to deal with.—It is impossible to contemplate the situation of the Plaintiff, without being disqualified, in some degree, to represent it to others with effect.—It is no less impossible for you, Gentlemen, to receive on a sudden the impressions which have been long in *my* mind, without feeling overpowered with sensations, which, after all, had better be absent, when men are called upon, in the exercise of duty, to pronounce a legal judgment.

The Plaintiff is the third son of His Grace the Archbishop of York, a clergyman of the Church of England ; presented in the year 1791, to the living of Stokeley, in Yorkshire ; and now, by His Majesty's favour, Dean of the Cathedral of York.—He married, in the year 1789, Miss Sutton, the daughter of Sir Richard Sutton, Bart. of Norwood, in Yorkshire, a lady of great beauty and accomplishments, most virtuously educated, and who, but for the crime of the Defendant which assembles you here, would, as she has expressed it herself, have been the happiest of womankind. This gentleman having been presented in 1791, by his father, to this living, where I understand there had been no resident Rector for forty years, set an example to the Church and to the Public, which was peculiarly virtuous in a man circumstanced as he was ; for, if there can be any person more likely than another to protect himself securely with privileges and indulgences, it might be supposed to be the son of the metropolitan of the province. This gentleman, however, did not avail himself of the advantage of his birth and station : for, although he was a very young man, he devoted himself entirely to the sacred duties of his profession ;—at a large expense he repaired the Rectory-house for the reception of his family, as if it had been his own patrimony, whilst, in his extensive improvements, he adopted only those arrangements which were calculated to lay the foundation of an innocent and peaceful life.—He had married this lady, and entertained no other thought than that of cheerfully devoting himself to all the duties, public and private, which his situation called upon him to perform.

About this time, or soon afterwards, the Defendant became the purchaser of an estate in the neighbourhood of Stokeley, and, by such purchase, an inhabitant of that part of the country, and the neighbour of this unfortunate gentleman.—It is a most affecting circumstance, that the Plaintiff and the Defendant had been bred together at Westminster School ; and in my mind it is still more affecting, when I reflect what it is which has given to that school so much rank, respect, and illustration.—It has derived its highest advantages from the reverend father of the unfortunate gentleman whom I represent.—It was the School of Westminster which gave birth to that learning which afterwards presided over it, and advanced its character.—However some men may be disposed to speak or write concerning public schools, I take upon me to say, they are among the wisest of our institutions ;—whoever looks at the national character of the English people, and compares it with that of all the other nations upon the earth, will be driven to impute it to that reciprocation of ideas and sentiments which fill and fructify the mind in the early period of youth, and to the affectionate sympathies and friendships which rise up in the human heart before it is deadened and perverted by the interests and corruptions of the world. These youthful attachments are proverbial, and, indeed, few instances have occurred of any breaches of them ; because a man, before he can depart from the obligations they impose, must have forsaken every principle of virtue, and every sentiment of manly honour. When, therefore, the Plaintiff found his old schoolfellow and companion settled in his neighbourhood, he immediately considered him as his

brother.—Indeed, he might well consider him as a brother, since, after having been at Westminster, they were *again* thrown together in the same college at Oxford; so that the friendship they had formed in their youth, became cemented and consolidated upon their first entrance into the world.—It is no wonder, therefore, that when the Defendant came down to settle in the neighbourhood of the Plaintiff, he should be attracted towards him by the impulse of his former attachment: he recommended him to the Lord Lieutenant of the County, and, being himself a magistrate, he procured him a share in the magistracy.—He introduced him to the respectable circle of his acquaintances: he invited him to his house, and cherished him there as a friend. It is *this* which renders the business of to-day most affecting, as it regards the Plaintiff, and wicked in the extreme, as it relates to the Defendant, because the confidences of friendship conferred the opportunities of seduction.—The Plaintiff had no pleasures or affections beyond the sphere of his domestic life; and except on his occasional residences at York, which were but for short periods, and at a very inconsiderable distance from his home, he constantly reposed in the bosom of his family. I believe it will be impossible for my Learned Friend to invade his character; on the contrary, he will be found to have been a pattern of conjugal and parental affection.

Mr. Fawcett being thus settled in the neighbourhood, and thus received by Mr. Markham as his friend and companion, it is needless to say he could harbour no suspicion that the Defendant was meditating the

seduction of his wife :—there was nothing, indeed, in his conduct, or in the conduct of the unfortunate lady, that could administer any cause of jealousy to the most guarded or suspicious temper. Yet, dreadful to relate, and it is, indeed, the bitterest evil of which the Plaintiff has to complain, a criminal intercourse for nearly five years before the discovery of the connexion had most probably taken place.

I leave you to consider what must have been the feelings of such a husband, upon the fatal discovery that his wife, and such a wife, had conducted herself in a manner that not merely deprived him of her comfort and society, but placed him in a situation too horrible to be described. If a man without children is suddenly cut off by an adulterer from all the comforts and happiness of marriage, the discovery of *his* condition is happiness itself when compared with that to which the Plaintiff is reduced. When children, by a woman, lost for ever to the husband, by the arts of the adulterer, are begotten in the unsuspected days of virtue and happiness, there remains a consolation ; mixed, indeed, with the most painful reflections, yet a consolation still.—But what is the Plaintiff's situation ? —He does not know at *what time* this heavy calamity fell upon him—he is tortured with the most afflicting of all human sensations.—When he looks at the children, whom he is by law bound to protect and to provide for, and from whose existence he ought to receive the delightful return which the union of instinct and reason has provided for the continuation of the world, he knows not whether he is lavishing his fond-

ness and affection upon his own children, or upon the seed of a villian sown in the bed of his honour and his delight.—He starts back with horror, when, instead of seeing his own image reflected from their infant features, he thinks he sees the destroyer of his happiness—a midnight robber introduced into his house, under professions of friendship and brotherhood—a plunderer, not in the repositories of his treasure which may be supplied, or lived without, “*but there where he had garnered up his hopes, where either he must live or bear no life.*”

In this situation, the Plaintiff brings his case before you, and the Defendant attempts no manner of defence : he admits his guilt,—he renders it unnecessary for me to go into any proof of it ; and the only question, therefore, that remains, is for you to say what shall be the consequences of his crime, and what verdict you will pronounce against him. You are placed, therefore, in a situation most momentous to the public : you have a duty to discharge, the result of which, not only deeply affects the present generation, but which remotest posterity will contemplate to your honour or dishonour.—On *your* verdict it depends whether persons of the description of the Defendant, who have cast off all respect for religion, who laugh at morality, when it is opposed to the gratification of their passions, and who are careless of the injuries they inflict upon others, shall continue their impious and destructive course with impunity.—On *your* verdict it depends whether such men, looking to the proceedings of Courts of Justice, shall be able to say to themselves, that

there are *certain limits* beyond which the damages of Juries are not to pass. On *your* verdict it depends whether men of large fortunes shall be able to adopt this kind of reasoning to spur them on in the career of their lusts: *There are many chances that I may not be discovered at all:—there are chances, that, if I am discovered, I may not be the object of legal inquiry,—and supposing I should, there are certain damages, beyond which a Jury cannot go;—they may be large,—but still within a certain compass; if I cannot pay them myself, there may be persons belonging to my family who will pity my situation—somehow or other the money may be raised, and I may be delivered from the consequences of my crime.* I TRUST THE VERDICT OF THIS DAY WILL SHOW MEN WHO REASON THUS, THAT THEY ARE MISTAKEN.

The action for adultery, like every other action, is to be considered according to the extent of the injury, which the person complaining to a Court of Justice has received. If he has received an Injury, or sustained a loss that can be estimated directly in money, there is then no other medium of redress, but in monies numbered according to the extent of the proof: I apprehend it will not be even stated by the Counsel for the Defendant, that if a person has sustained a loss, and can show it is to any given extent, he is not entitled to the *full measure* of it in damages. If a man destroys my house or furniture, or deprives me of a chattel, I have a right, *beyond all manner of doubt*, to recover their corresponding values in money; and it is no answer to me to say, that he who has deprived

me of the advantage I before possessed, is in no situation to render me satisfaction.—A verdict pronounced upon such a principle, in any of the cases I have alluded to, would be set aside by the Court, and a new trial awarded.—It would be a direct breach of the oaths of Jurors, if, impressed with a firm conviction that a Plaintiff had received damages to a given amount, they retired from their duty, because they felt commiseration for a Defendant, even in a case where he might be worthy of compassion from the injury being unpremeditated and inadvertent.

But there are other wrongs which cannot be estimated in money :

“ You cannot minister to a *mind* diseases’ d.”

You cannot redress a man who is wronged beyond the possibility of redress :—the law has no means of restoring to him what he has lost.—God himself, as he has constituted human nature, has no means of alleviating such an injury as the one I have brought before you.—While the sensibilities, affections, and feelings he has given to man remain, it is impossible to heal a wound which strikes so deep into the soul.—When you have given to a Plaintiff, in damages, all that figures can number, it is as nothing ;—he goes away hanging down his head in sorrow, accompanied by his wretched family, dispirited and dejected. Nevertheless, the law has given a civil action for adultery, and, strange to say, it has given *nothing else*.—The law commands that the injury shall be compensated (as far

as it is practicable) IN MONEY, because Courts of *Civil* Justice have no other means of compensation THAN *money*; and the only question, therefore, and which *you* upon your oaths are to decide, is this: has the Plaintiff sustained an injury up to the extent which he has complained of? Will twenty thousand pounds place him in the same condition of comfort and happiness that he enjoyed before the adultery, and which the adulterer has deprived him of? You know that it will not.—Ask your own hearts the question, and you will receive the same answer.—I should be glad to know, then, upon what principle, as it regards the *private* justice, which the Plaintiff has a right to, or upon what principle, as the example of that justice affects the public and the remotest generations of mankind, you can reduce this demand even in a single farthing.

This is a doctrine which has been frequently countenanced by the Noble and Learned Lord who lately presided in the Court of King's Bench;* but his Lordship's reasoning on the subject has been much misunderstood, and frequently misrepresented.—The Noble Lord is supposed to have said, that although a Plaintiff may not have sustained an injury by adultery to a given amount, yet that large damages, for the sake of public example, should be given.—He never said any such thing.—He said that which law and morals dictated to him, and which will support his reputation as long as law and morals have a footing in

* Lord Kenyon.

the world.—He said that every Plaintiff had a right to recover damages *up to the extent of the injury he had received*, and that public example stood in the way of showing *favour* to an adulterer, by reducing the damages below the sum, which the Jury would otherwise consider as the lowest compensation for the wrong. If the Plaintiff shows you that he was a most affectionate husband ; that his parental and conjugal affections were the solace of his life ; that for nothing the world could bestow in the shape of riches or honours, would he have bartered one moment's comfort in the bosom of his family, he shows you a wrong *that no money can compensate* ;—nevertheless, if the injury is only measurable in money, and if you are sworn to make upon your oaths a pecuniary compensation, though I can conceive that the damages when given to the extent of the declaration, and you can give no more, may fall short of what your consciences would have dictated, yet I am utterly at a loss to comprehend upon what principle they can be *lessened*.—But then comes the Defendant's Counsel, and says, “ It is true that the injury cannot be compensated by “ the sum which the Plaintiff has demanded ; but you “ will consider the miseries my Client must suffer, if you “ make him the object of a severe verdict.—You must, “ therefore, regard him with compassion ; though I am “ ready to admit the Plaintiff is to be compensated for “ the injury he has received.”

Here, then, Lord Kenyon's doctrine deserves consideration.—“ He who will mitigate damages below

“the fair estimate of the wrong which he has committed, must do it upon some principle which the policy of the law will support.”

Let me then examine whether the Defendant is in a situation which entitles him to have the damages against him *mitigated*, when private justice to the injured party calls upon you to give them TO THE UTMOST FARTHING. The question will be—on what principle of mitigation he can stand before you? I had occasion, not a great while ago, to remark to a Jury, that the wholesome institutions of the civilized world came seasonably in aid of the dispensations of Providence for our well-being in the world. If I were to ask, what it is that prevents the prevalence of the crime of incest, by taking away those otherwise natural impulses, from the promiscuous gratification of which we should become like the beasts of the field, and lose all the intellectual endearments which are at once the pride and the happiness of man?—What is it that renders our houses pure, and our families innocent?—It is that, by the wise institutions of all civilized nations, there is placed a kind of guard against the human passions, in that sense of impropriety and dishonour, which the law has raised up, and impressed with almost the force of a second nature.—This wise and politic restraint beats down, by the habits of the mind, even a propensity to incestuous commerce, and opposes those inclinations, which nature, for wise purposes, has implanted in our breasts at the approach of the other sex.—It holds the mind in chains against the seductions of beauty.—It

is a moral feeling in perpetual opposition to human infirmity.—It is like an angel from heaven placed to guard us against propensities which are evil.—It is *that* warning voice, Gentlemen, which enables you to embrace your daughter, however lovely, without feeling that you are of a different sex.—It is *that* which enables you, in the same manner, to live familiarly with your nearest female relations, without those desires which are natural to man.

Next to the tie of blood (if not, indeed, before it), is the sacred and spontaneous relation of friendship. The man who comes under the roof of a married friend, ought to be under the dominion of the same moral restraint: and, thank God, generally is so, from the operation of the causes which I have described.—Though not insensible to the charms of female beauty, he receives its impressions under a habitual reserve, which honour imposes.—Hope is the parent of desire, and honour tells him he must not hope.—Loose thoughts may arise, but they are rebuked and dissipated—

“ Evil into the mind of God or man

“ May come and go, so unapprov'd, and leave

“ No spot or blame behind.”

Gentlemen, I trouble you with these reflections, that you may be able properly to appreciate the guilt of the Defendant; and to show you, that you are not in a case where large allowances are to be made for the ordinary infirmities of our imperfect natures. When a man does wrong in the heat of *sudden* passion—as, for instance, when, upon receiving an affront,

he rushes into immediate violence, even to the deprivation of life, the humanity of the law classes his offence amongst the lower degrees of homicide; it supposes the crime to have been committed before the mind had time to parley with itself.—But is the criminal act of such a person, however disastrous may be the consequence, to be compared with that of the Defendant?—Invited into the house of a friend,—received with the open arms of affection, as if the same parents had given them birth and bred them;—in THIS situation, this most monstrous and wicked Defendant deliberately perpetrated his crime; and, shocking to relate, not only continued the appearances of friendship, after he had violated its most sacred obligations, but continued them as a cloak to the barbarous repetitions of his offence—writing letters of regard, whilst, perhaps, he was the father of the last child, whom his injured friend and companion was embracing and cherishing as his own.—What protection can such conduct possibly receive from the humane consideration of the law for sudden and violent passions? A passion for a woman is progressive—it does not, like anger, gain an uncontrolled ascendancy in a moment, nor is a modest matron to be seduced in a day. Such a crime cannot, therefore, be committed under the resistless dominion of *sudden* infirmity; it must be *deliberately, wilfully, and wickedly* committed.—The Defendant could not possibly have incurred the guilt of this adultery, without often passing through his mind (for he had the education and principles of a gentleman) the very topics I have been insisting upon

before you for his condemnation.—Instead of being suddenly impelled towards mischief, without leisure for such reflections, he had innumerable difficulties and obstacles to contend with.—He could not but hear in the first refusals of this unhappy lady, every thing to awaken conscience, and even to excite horror.—In the arguments he must have employed to seduce *her* from *her* duty, he could not but recollect, and wilfully trample upon *his own*. He was a year engaged in the pursuit—he resorted repeatedly to his shameful purpose, and advanced to it at such intervals of time and distance, as entitle me to say, that he determined in cold blood to enjoy a future and momentary gratification, at the expense of every principle of honour which is held sacred amongst gentlemen, even where no laws interpose their obligations or restraints.

I call upon you, therefore, Gentlemen of the Jury, to consider well this case, for it is *your* office to keep human life in tone—*your* verdict must decide whether such a case can be indulgently considered, without tearing asunder the bonds which unite society together.

Gentlemen, I am not preaching a religion which men can scarcely practise.—I am not affecting a severity of morals beyond the standard of those whom I am accustomed to respect, and with whom I associate in common life.—I am not making a stalking-horse of adultery, to excite exaggerated sentiment.—This is not the case of a gentleman meeting a handsome woman in a public street, or in a place of public amusement; where, finding the coast clear for his addresses, without interruption from those who should interrupt, he finds

himself engaged (probably the successor of another) in a vain and transitory intrigue. It is not the case of him who, night after night, falls in with the wife of another to whom he is a stranger, in the boxes of a theatre, or other resorts of pleasure, inviting admirers by indecent dress and deportment, unattended by any thing which bespeaks the affectionate wife and mother of many children.—Such connexions may be of evil example, but I am not here to reform public manners, but to demand private justice.—It is impossible to assimilate the sort of cases I have alluded to, which ever will be occasionally occurring, with this atrocious invasion of household peace ; this portentous disregard of every thing held sacred amongst men good or evil. Nothing, indeed, can be more affecting than even to be called upon to state the evidence I must bring before you ; I can scarcely pronounce to you that the victim of the Defendant's lust was the mother of nine children, seven of them females and infants, unconscious of their unhappy condition, deprived of their natural guardian, separated from her for ever, and entering the world with a dark cloud hanging over them.—But it is not in the descending line alone that the happiness of this worthy family is invaded.—It hurts me to call before you the venerable progenitor of both the father and the children, who has risen by extraordinary learning and piety to his eminent rank in the Church, and who, instead of receiving, unmixed and undisturbed, the best consolation of age, in counting up the number of his descendants, carrying down the name and honour of his house to future times,

may be forced to turn aside his face from *some of them*, that bring to his remembrance the wrongs which now oppress him, and which it is his duty to forget, because it is his, otherwise impossible, duty to forgive them.

Gentlemen, if I make out this case by evidence (and, if I do not, forget every thing you have heard, and reproach me for having abused your honest feelings), I have established a claim for damages that has no parallel in the annals of fashionable adultery.—It is rather like the entrance of Sin and Death into this lower world.—The undone pair were living like our first parents in Paradise, till this demon saw and envied their happy condition.—Like them, they were in a moment cast down from the pinnacle of human happiness into the very lowest abyss of sorrow and despair. In one point, indeed, the resemblance does not hold, which, while it aggravates the crime, redoubles the sense of suffering.—It was not from an enemy, but from a friend, that this evil proceeded. I have just had put into my hand, a quotation from the Psalms upon this subject, full of that unaffected simplicity which so strikingly characterizes the sublime and sacred Poet :

“It is not an open enemy that hath done me this dishonour, for then I could have borne it.

“Neither was it mine adversary that did magnify himself against me : for then, peradventure, I would have hid myself from him.

“But it was even *thou* my companion, my guide, mine own familiar friend.”

This is not the language of Counsel, but the inspired language of truth. I ask you solemnly, upon your honours and your oaths, if you would exchange the Plaintiff's former situation for his present, for an hundred times the compensation he requires at your hands. I am addressing myself to affectionate husbands and to the fathers of beloved children.—Suppose I were to say to you, There is twenty thousand pounds for you—embrace your wife for the last time, and the child that leans upon her bosom and smiles upon you—retire from your house, and make way for the adulterer—wander about an object for the hand of scorn to point its slow and moving finger at—think no more of the happiness and tranquillity of your former state—I have destroyed them for ever; but never mind—don't make yourself uneasy—here is a draft upon my banker, it will be paid at sight—there is no better man in the city.—I can see you think I am mocking you, Gentlemen, and well you may; but it is the very pith and marrow of this cause. It is impossible to put the argument in mitigation of damages, in plain English, without talking such a language, as appears little better than an insult to your understandings, dress it up as you will.

But it may be asked,—if no money can be an adequate or indeed any compensation, why is Mr. Markham a Plaintiff in a CIVIL ACTION? Why does he come here for money?—Thank God, Gentlemen, it is NOT MY FAULT. I take honour to myself, that I was one of those who endeavoured to put an end to this species of action, by the adoption of a more salutary

course of proceeding.—I take honour to myself, that I was one of those who supported in Parliament, the adoption of a law to pursue such outrages with the terrors of criminal justice. I thought then, and I shall always think, that every act *malum in se* directly injurious to an individual, and most pernicious in its consequences to society, should be considered to be a misdemeanor. Indeed I know of no other definition of the term; the Legislature, however, thought otherwise, and I bow to its decision; but the business of this day may produce some changes of opinion on the subject.—I never meant that *every* adultery was to be similarly considered. Undoubtedly there are cases where it is comparatively venial, and Judges would not overlook the distinctions.—I am not a pretender to any extraordinary purity.—My severity is confined to cases in which there can be but one sentiment amongst men of honour, as to the offence, though they may differ in the mode and measure of its correction.

It is this difference of sentiment, Gentlemen, that I am alone afraid of; I fear you may think there is a sort of limitation in verdicts, and that you may look to precedents for the amount of damages, though you can find no precedent for the magnitude of the crime; but you might as well abolish the action altogether, as lay down a principle which limits the consequences of adultery to what it may be convenient for the adulterer to pay. By the adoption of such a principle, or by any mitigation of severity, arising even from an insufficient reprobation of it, you unbar the sanctuary

of domestic happiness, and establish a sort of license for debauchery, to be sued out like other licenses, at its price;—a man has only to put money into his pocket, according to his degree and fortune, and he may then debauch the wife or daughter of his best friend, at the expense he chooses to go to.—He has only to say to himself what Iago says to Roderigo in the play—

“Put money in thy purse—go to—put money in thy purse.”

Persons of immense fortunes might, in this way, deprive the best men in the country of their domestic satisfactions, with what to them might be considered as impunity. The most abandoned profligate might say to himself, or to other profligates, “I have suffered judgment by default—let them send down their Deputy Sheriff to the King’s Arms Tavern; I shall be concealed from the eye of the public.—I have drawn upon my banker for the *utmost damages*, and I have as much more to spare to-morrow, if I can find another woman whom I would choose to enjoy at such a price,” In this manner I have seen a rich delinquent, too lightly fined by courts of criminal justice, throw down his bank-notes to the officers, and retire with a deportment, not of contrition, but contempt.

For these reasons, Gentlemen, I expect from you to-day the full measure of damages demanded by the Plaintiff. Having given such a verdict, you will retire with a monitor within, confirming that you have done right—you will retire in sight of an approving

public, and an approving Heaven. Depend upon it, the world cannot be held together, without morals, nor can morals maintain their station in the human heart without religion, which is the corner-stone of the fabric of human virtue.

We have lately had a most striking proof of this sublime and consoling truth, in *one* result, *at least*, of the revolution which has astonished and shaken the earth. Though a false philosophy was permitted *for a season* to raise up her vain fantastic front, and to trample down the Christian establishments and institutions, yet, on a sudden, God said, "Let there be light, and there was light." The altars of religion were restored : not purged indeed of human errors and superstitions, not reformed in the just sense of reformation, yet the Christian religion is still re-established ; leading on to further reformation ;—fulfilling the hope, that the doctrines and practice of Christianity shall overspread the face of the earth.

Gentlemen, as to us, we have nothing to wait for ;—we have long been in the centre of light—we have a true religion and a free government, AND YOU ARE THE PILLARS AND SUPPORTERS OF BOTH.

I have nothing further to add, except that, since the Defendant committed the injury complained of, he has sold his estate, and is preparing to remove into some other country. Be it so.—Let him *remove* ; but you will have to pronounce the penalty of his *return*. It is for you to declare whether such a person is worthy to be a member of our community. But if the feebleness of your jurisdiction, or a commiseration

which destroys the exercise of it, shall shelter such a criminal from the consequences of his crimes, individual security is gone, and the rights of the public are unprotected. Whether this be our condition or not, I shall know by your verdict.

S P E E C H

FOR THE

HON. RICHARD BINGHAM,

NOW EARL OF LUCAN.

THE following Speech, like the former, requires no Preface. It was delivered by Mr. Erskine in the Court of King's Bench, on Monday, February 24, 1794, as Counsel for the present Lord Lucan, in an action brought against him by Bernard Edward Howard, Esq. presumptive heir of the Duke of Norfolk, for adultery with his wife. The circumstances, under which the damages were sought to be mitigated, in opposition to the severe principle regarding them, insisted upon in the Speech for Mr. Markham, appear fully in the Speech itself.

The Jury found only Five Hundred Pounds damages.

MR. ERSKINE.

GENTLEMEN OF THE JURY—My Learned Friend, as Counsel for the Plaintiff, has bespoke an address from me, as Counsel for the Defendant, which you must not, I assure you, expect to hear. He has thought it right (partly in courtesy to me, as I am willing to believe, and in part for the purposes of his cause), that you should suppose you are to be addressed with eloquence which I never possessed, and which if I did, I should be incapable at this moment of exerting; because the most eloquent man, in order to exert his eloquence, must have his mind free from embarrassment on the occasion on which he is to speak:—I am not in that condition. My Learned Friend has expressed himself as the Friend of the Plaintiff's family:—He does not regard that family more than I do; and I stand in the same predicament towards my own honourable Client and his relations; I know him and them, and because I know them, I regard them also: my embarrassment, however, only arises at being obliged to discuss this question in a public Court of Justice, because, could it have been the subject of private reference, I should have felt none at all in being called upon to settle it.

Gentlemen, my embarrassment is abundantly increased, when I see present a noble person, high, very high in rank in this kingdom, but not higher in rank than he is in my estimation:—I speak of the Noble Duke of Norfolk, who most undoubtedly must

feel not a tittle, at being obliged to come here as a witness for the Defendant in the cause of a Plaintiff so nearly allied to himself: I am persuaded no man can have so little sensibility, as not to feel that a person in my situation, must be greatly embarrassed in discussing a question of this nature before such an audience, and between such parties as I have described.

Gentlemen, my Learned Friend desired you would take care not to suffer argument, or observation, or eloquence to be called into the field, to detach your attention from the evidence in the Cause, upon which alone you ought to decide: I wish my Learned Friend at the moment he gave you that caution, had not *himself* given testimony of a fact, to which he stood the solitary witness: I wish he had not introduced *his own evidence*, without the ordinary ceremony of being sworn.—I will not follow his example.—I will not tell you, what I know from the conversation of my Client, nor give evidence of what I know myself:—my Learned Friend tells you, that nothing can exceed the agony of mind his Client has suffered, and that no words can describe his adoration of the lady he has lost; these most material points of the Cause rest, however, altogether on the *single, unsupported, unsworn evidence of the COUNSEL* for the Plaintiff.—No RELATION has been called upon to confirm them, though we are told, that the whole house of Fauconberg, Bellasyse, and Norfolk, are in the avenues of the Court, ready, it seems, to be called at my discretion:—and yet my Learned Friend is himself the only witness; though the facts (and most material facts, in-

deed, they would have been) might have been proved by so many illustrious persons.

Now, to show you how little disposed I am to work upon you by any thing but by proof; to convince you, how little desirous I am to practise the arts of speech as my only artillery in this Cause; I will begin with a few plain dates, and, as you have pens in your hands I will thank you to write them down.

I shall begin with stating to you, what my Cause is, and shall then prove it; not by myself, but by witnesses.

The parties were married on the 24th of April, 1789.—The child that has been spoken of, and in terms which gave me great satisfaction, as the admitted son of the Plaintiff, blessed with the affection of his parent, and whom the noble person to whom he may become heir, can look upon without any unpleasant reflection: that child was born on the 12th of August, 1791; take that date, and my *Learned Friend's admission*, that this child must have been the child of Mr. Howard; an admission which could not have been rationally or consistently made, but upon the implied admission, that no illicit connexion had *existed previously*, by which its existence might have been referred to the Defendant.—On this subject, therefore, the Plaintiff must be silent:—he cannot say the parental mind has been wrung:—he cannot say hereafter, “NO SON OF MINE SUCCEEDING;” he can say none of these things.—The child was born on the 12th of August, 1791, and, as Mr. Howard is *admitted* to be the author of its existence (which he must have been, if at

all, in 1790), I have a right to say, that, during all that interval, this gentleman could not have had the least reasonable cause of complaint against Mr. Bingham: his jealousy must, of course, have begun *after* that period; for, had there been grounds for it *before*, there could be no sense in the admission of his Counsel, nor any foundation for that parental consolation which was brought forward in the very front of the Cause.

The next dry date is, therefore, the 24th of July, 1793: and I put it to his Lordship, that there is no manner of evidence which can be pressed into this Cause *previous* to that time. Let me next disembarass the Cause from another assertion of my Learned Friend, namely, that a divorce cannot take place before the birth of this child; and that, if the child happens to be a son, which is *one* contingency; and if the child so born does not die, which is *another* contingency, and if the Noble Duke dies without issue, which is a *third* contingency, *then* this child might inherit the honours of the House of Norfolk: that I deny.—My recent experience tells me the contrary. In a case where Mr. Stewart, a gentleman in Ireland, stood in a similar predicament, the Lords and Commons of England not only passed an Act of Divorce between him and his lady, but, on finding there was no access on the part of the husband, and that the child was not his, they bastardized the issue.

What then remains in this Cause?—Gentlemen, there remains only this. In what manner, when you have heard my evidence (for this is a Cause, which,

like all others, must stand upon evidence), the Plaintiff shall be able to prove what I have the Noble Judge's authority for saying, he *must* prove, viz. *the loss of the comfort and society of his wife, by the seduction of the Defendant.*—THAT is the very gist of the action.—The loss of her affection, and of domestic happiness, are the only legal foundations of his complaint.

Now, before any thing can be *lost*, it must have *existed* ;—before any thing can be taken away from a man, he must have had it ;—before the seduction of a woman's affections from her husband can take place, he must have possessed her affections.

Gentlemen, my Friend, Mr. Mingay, acknowledges this to be the law, and he shapes his case accordingly : he represents his Client, a branch of a most illustrious House, as casting the eyes of affection upon a *disengaged* woman, and of rank equal to, or, at least, suitable to his own : he states a marriage of mutual affection, and endeavours to show, that this young couple, with all the ardour of love, flew into each other's embraces : he shows a child, the fruit of that affection, and finishes with introducing the seductive adulterer coming to disturb all this happiness, and to destroy the blessings which he describes : he exhibits the Defendant, coming with all the rashness and impetuosity of youth, careless of the consequences, and thinking of nothing but how he could enjoy his own lustful appetite, at the expense of another man's honour ; while the unhappy husband is represented, as watching with anxiety over his beloved wife, anxious to secure her

affections, and on his guard to preserve her virtue. Gentlemen, if such a case, or any thing resembling it, is established, I shall leave the Defendant to whatever measure of damages you choose in your resentment to inflict.

In order, therefore, to examine this matter (and I shall support every syllable that I utter, with the most precise and uncontrovertible proofs); I will begin with drawing up the curtains of this blessed marriage-bed, whose joys are supposed to have been nipped in the bud, by the Defendant's adulterous seduction.

Nothing, certainly, is more delightful to the human fancy, than the possession of a beautiful woman in the prime of health, and youthful passion : it is, beyond all doubt, the highest enjoyment which God in his benevolence, and for the wisest purposes, has bestowed upon his own image : I reverence, as I ought, that mysterious union of mind and body, which, while it continues our species, is the source of all our affections ; which builds up and dignifies the condition of human life ; which binds the husband to the wife by ties more indissoluble, than laws can possibly create ; and which, by the reciprocal endearments arising from a mutual passion, a mutual interest, and a mutual honour, lays the foundation of that parental affection which dies in the brutes, with the necessities of Nature, but which reflects back again upon the human parents, the unspeakable sympathies of their offspring, and all the sweet, delightful relations of social existence.—While the curtains, therefore, are yet closed upon this

bridal scene, your imaginations will naturally represent to you this charming woman, endeavouring to conceal sensations which modesty forbids the sex, however enamoured, too openly to reveal, wishing, beyond adequate expression, what she must not even attempt to express ; and seemingly resisting what she burns to enjoy.

Alas, Gentlemen ! you must now prepare to see, in the room of this, a scene of horror, and of sorrow ; you must prepare to see a noble lady, whose birth surely required no further illustration ; who had been courted to marriage before she ever heard even her husband's name ; and whose affections were irretrievably bestowed upon, and pledged to my honourable and unfortunate Client ; you must behold her given up to the Plaintiff by the infatuation of parents, and stretched upon this bridal bed as upon a rack ;—torn from the arms of a beloved and impassioned youth, himself of noble birth, only to secure the honours of a higher title ; a legal victim on the altar of Heraldry.

Gentlemen, this is no high colouring for the purpose of a cause ;—no words of an advocate can go beyond the plain, unadorned effect of the evidence : I will prove to you, that when she prepared to retire to her chamber, she threw her desponding arms around the neck of her confidential attendant, and wept upon her as a criminal preparing for execution : I will prove to you, that she met her bridegroom with sighs and tears ; the sighs and tears of afflicted love for Mr. Bingham,

and of rooted aversion to her husband :—I think I almost hear her addressing him in the language of the poet,—

“I tell thee, Howard,
“Such hearts as ours were never pair’d above :
“Ill-suited to each other ; join’d, not match’d ;
“Some sullen influence, a foe to both,
“Has wrought this fatal marriage to undo us.
“Mark but the frame and temper of our minds,
“How very much we differ.—Ev’n this day,
“That fills thee with such ecstasy and transport,
“To me brings nothing that should make me bless it,
“To think it better than the day before,
“Or any other in the course of time,
“That duly took its turn, and was forgotten.”

Gentlemen, this was not the sudden burst of youthful disappointment, but the fixed and settled habit of a mind deserving of a happier fate :—I shall prove that she frequently spent her nights upon a couch, in her own apartments, dissolved in tears : that she frequently declared to her woman that she would rather go to Newgate than to Mr. Howard’s bed ; and it will appear, by his own confession, that for months subsequent to the marriage she obstinately refused him the privileges of a husband.

To all this it will be said by the Plaintiff’s Counsel (as it has indeed been hinted already), that disgust and alienation from her husband could not but be expected ; but that it arose from her affection for Mr. Bingham. Be it so, Gentlemen.—I readily admit, that if Mr. Bingham’s acquaintance with the lady had

commenced *subsequent to the marriage*, the argument would be irresistible, and the criminal conclusion against him unanswerable: but has Mr. Howard a right to instruct his Counsel to charge my honourable Client with seduction, when *he himself* was the SEDUCER? My Learned Friend deprecates the power of what he terms my pathetic eloquence: Alas, Gentlemen! if I possessed it, the occasion forbids its exertion, because Mr. Bingham has only to defend *himself*, and cannot demand damages from Mr. Howard for depriving him of what was *his* by a title superior to any law which man has a moral right to make: Mr. Howard was NEVER MARRIED: God and nature forbid the banns of such a marriage.—If, therefore, Mr. Bingham this day could have, by me, addressed to you his wrongs in the character of a Plaintiff demanding reparation, what damages might I not have asked for him; and, without the aid of this imputed eloquence, what damages might I not have expected.

I would have brought before you a noble youth, who had fixed his affections upon one of the most beautiful of her sex, and who enjoyed hers in return. —I would have shown you their suitable condition; —I would have painted the expectation of an honourable union, and would have concluded by showing her to you in the arms of another, by the legal prostitution of parental choice in the teeth of affection: with child by a rival, and only reclaimed at last, after so cruel and so afflicting a divorce, with her freshest charms despoiled, and her very morals in a manner impeached, by asserting the purity and virtue of her

original and spotless choice. Good God ! imagine my Client to be PLAINTIFF, and what damages are you not prepared to give him ? and yet he is here as DEFENDANT, and damages are demanded against HIM. —Oh, monstrous conclusion !

Gentlemen, considering my Client as perfectly safe, under these circumstances, I may spare a moment to render this Cause beneficial to the public.

It involves in it an awful lesson ; and more instructive lessons are taught in Courts of Justice than the church is able to inculcate.—Morals come in the cold abstract from pulpits ; but men smart under them practically when we lawyers are the preachers.

Let the aristocracy of England, which trembles so much for itself, take heed to its own security : let the nobles of England, if they mean to preserve that pre-eminence which, in some shape or other, must exist in every social community, take care to support it by aiming at that which is creative, and alone creative, of real superiority. Instead of matching themselves to supply wealth, to be again idly squandered in debauching excesses, or to round the quarters of a family shield ; instead of continuing their names and honours in cold and alienated embraces, amidst the enervating rounds of shallow dissipation, let them live as their fathers of old lived before them ;—let them marry as affection and prudence lead the way, and in the ardours of mutual love, and in the simplicities of rural life, let them lay the foundation of a vigorous race of men, firm in their bodies, and moral from early habits ; and instead of wasting their fortunes and their strength

in the tasteless circles of debauchery, let them light up their magnificent and hospitable halls to the gentry and peasantry of the country, extending the consolations of wealth and influence to the poor.—Let them but do this,—and instead of those dangerous and distracted divisions between the different ranks of life, and those jealousies of the multitude so often blindly painted as big with destruction; we should see our country as one large and harmonious family, which can never be accomplished amidst vice and corruption, by wars or treaties, by informations *ex officio* for libels, or by any of the tricks and artifices of the state:—would to God this system had been followed in the instance before us!—Surely the noble house of Fauconberg needed no further illustration; nor the still nobler house of Howard, with blood enough to have inoculated half the kingdom.—I desire to be understood to make these observations as general moral reflections, and not personally to the families in question; least of all to the noble house of Norfolk, the head of which is now present; since no man, in my opinion, has more at heart the liberty of the subject, and the honour of our country.

Having shown the feeble expectation of happiness from this marriage, the next point to be considered is this:—Did Mr. Bingham take advantage of that circumstance to increase the disunion?—I answer, No.—I will prove to you that he conducted himself with a moderation and restraint, and with a command over his passions, which I confess I did not expect to find, and which in young men is not to be expected:—I

shall prove to you, by Mr. Greville, that on this marriage taking place with the betrothed object of his affections, he went away a desponding man; his health declined; he retired into the country to restore it; and it will appear, that for months afterwards he never saw this lady until by mere accident he met her; and then, so far was he from endeavouring to renew his connexion with her, that she came home in tears, and said, he frowned at her as he passed:—this I shall prove to you by the evidence in the Cause.

Gentlemen, that is not all;—it will appear that when he returned to town, he took no manner of notice of her; and that her unhappiness was beyond all power of expression.—How, indeed, could it be otherwise after the account I have given you of the marriage?—I shall prove, besides, by a gentleman who married one of the daughters of a person to whom this country is deeply indebted for his eminent and meritorious service (Marquis Cornwallis), that from her utter reluctance to her husband, although in every respect honourable and correct in his manners and behaviour, he was not allowed *even the privileges of a husband*, for months after the marriage.—This I mentioned to you before, and only now repeat it in the statement of the proofs.—Nothing better, indeed, could be expected:—who can controul the will of a mis-matched, disappointed woman?—who can restrain or direct her passions?—I beg leave to assure Mr. Howard, (and I hope he will believe me when I say it), that I think his conduct towards this lady was just such as might have been expected from a husband who saw

himself to be the object of disgust to the woman he had chosen for his wife ; and it is with this view only that I shall call a gentleman to say how Mr. Howard spoke of this supposed, but, in my mind, impossible object of his adoration. How, indeed, is it possible to adore a woman when you know her affections are rivetted to another ?—It is unnatural !—A man may have that *appetite* which is common to the brutes, and too indelicate to be described ; but he can never retain an *affection* which is returned with detestation. Lady Elizabeth, I understand, was, at one time, going in a phaeton :—“ There she goes,” said Mr. Howard ; “ God damn her—I wish she may break her neck—I should “ take care how I got another.” This may seem unfeeling behaviour ; but in Mr. Howard’s situation, Gentlemen, it was the most natural thing in the world, for they cordially hated one another.—At last, however, the period arrived when the scene of discord became insupportable, and nothing could exceed the generosity and manly feeling of the noble person (the Duke of Norfolk) whose name I have been obliged to use in the course of this cause, in his interference to effect that separation which is falsely imputed to Mr. Bingham :—he felt so much commiseration for this unhappy lady, that he wrote to her in the most affecting style ;—I believe I have got a letter from his Grace to Lady Elizabeth, dated Sunderland, July the 27th, that is, three days after their separation ; but before he knew it had actually taken place : it was written in consequence of one received from Mr. Howard upon the subject :—among other thing he says, “ *I sincerely*

feel for you." Now, if the Duke had not known at that time that Mr. Bingham had her earliest and legitimate affections, she could not have been an object of that pity which she received : she was, indeed, an object of the sincerest pity, and the sum and substance of this mighty seduction will turn out to be no more than this ; that she was affectionately received by Mr. Bingham after the final period of voluntary separation : at four o'clock this miserable couple had parted *by consent*, and the chaise was not ordered till she might be considered as a single woman by the abandonment of her husband. Had the separation been *legal and formal*, I should have applied to his Lordship, upon the most unquestionable authorities, to nonsuit the Plaintiff ; for this action being founded upon the loss of the wife's society, it must necessarily fall to the ground if it appears that the society, though not the marriage union, was interrupted by a previous act of his own : in that hour of separation I am persuaded he never considered Mr. Bingham as an object of resentment or reproach : he was the author of his own misfortunes, and I can conceive him to have exclaimed in the language of the poet, as they parted,

" ——— Elizabeth never lov'd me.

" Let no man, after me, a woman wed

" Whose heart he knows he has not ; though she brings

" A mine of gold, a kingdom for her dowry.

" For let her seem, like the night's shadowy queen,

" Cold and contemplative—he cannot trust her :

" She may, she will, bring shame and sorrow on him ;

" The worst of sorrows, and the worst of shames !"

You have, therefore, before you, Gentlemen, two young men of fashion, both of noble families, and in the flower of youth : the proceedings, though not collusive, cannot possibly be vindictive : they are indispensably preliminary to the dissolution of an inauspicious marriage, which never should have existed : Mr. Howard may then profit by an useful, though an unpleasant experience, and be happier with a woman whose mind he may find disengaged ; whilst the parents of the rising generation, taking warning from the lesson which the business of the day so forcibly teaches, may avert from their families, and the public, that bitterness of disunion, which, while human nature continues to be itself, will ever be produced to the end of time, from similar conjunctures.

Gentlemen, I have endeavoured so to conduct this cause as to offend no man :—I have guarded against every expression which could inflict unnecessary pain ; and, in doing so, I know that I have not only served my Client's interests, but truly represented his honourable and manly disposition. As the case before you cannot be considered by any reasonable man as an occasion for damages, I might here properly conclude ; yet, that I may omit nothing which might apply to any possible view of the subject, I will conclude with reminding you, that my Client is a member of a numerous family ; that, though Lord Lucan's fortune is considerable, his rank calls for a corresponding equipage and expense : he has other children—one already married to an illustrious nobleman, and another yet to be married to some man who must be happy indeed

if he shall know her value: Mr. Bingham, therefore, is a man of no fortune; but the heir only of, I trust, a very distant expectation. Under all these circumstances, it is but fair to believe, that Mr. Howard comes here for the reasons I have assigned, and not to take money out of the pocket of Mr. Bingham to put into his own.—You will, therefore, consider, Gentlemen, whether it would be creditable for you to offer, what it would be disgraceful for Mr. Howard to receive.

THE KING v. CUTHELL.

PREFACE.

THE following Speech of Lord Erskine, in the Court of King's Bench, at Westminster, on the 21st of February, 1799, for Mr. Cuthell, the bookseller, in Holborn, becomes peculiarly interesting at the present moment, from the verdict of a Special Jury very lately at Guildhall, London, in the case of Mr. White, the proprietor of the Independent Whig, as the doctrine upon which that verdict appears to have proceeded, was strongly insisted upon by Lord Erskine, in Mr. Cuthell's case, and every possible argument employed to support it: but the doctrine was then over-ruled by Lord Kenyon, at Westminster, as it was lately by Lord Ellenborough at Guildhall; and, indeed, Lord Erskine appears to have been so sensible of the current of authorities against him, *which would, at all events, be binding on a single Judge proceeding on such a trial*, whatever he might think of the propriety of former decisions on the subject, that he appears to have pressed the Jury to bring in a special verdict in Mr. Cuthell's case; finding the publication, or even a *negligent* publication, but negating the criminal intention charged by the Indictment; so as to bring the question before all the Judges, and even before the House of Lords, in the dernier resort—whether such a verdict would support a judgment on the record. The case of Mr. Cuthell was shortly this: The Bishop of Landaff, in the year 1798, had published a pamphlet inculcating the duty of the people of this country, to exert themselves to the utmost in the critical exigency of its affairs, in consequence of the French revolution, and the danger of

an invasion from France, and inculcating the propriety of submitting to a regular system of high taxation within the year, for supplying every necessity of the state. To this pamphlet the Rev. Mr. Gilbert Wakefield, well known and remembered as an eminent scholar, published a reply, on the appearance of which in the shops of London, the late Mr. Johnson of St. Paul's Church-yard, and another bookseller who had sold it, were prosecuted by the Attorney-General, and convicted; Lord Kenyon and the two Special Juries who tried the causes at Guildhall, having considered Mr. Wakefield's pamphlet to be a seditious libel, and the booksellers responsible as publishers.

After these convictions, the Attorney-General indicted Mr. Wakefield himself as the author, and Mr. Cuthell, the bookseller, of Holborn, who had sold it in his shop. Mr. Cuthell's case was a very particular one. He was not a publisher of books or pamphlets on political or other transitory subjects, but dealt almost entirely in books of classical learning; and as such a bookseller had been selected by Mr. Wakefield to publish many of his learned works, *but never any other*, nor had, indeed, Mr. Wakefield written any other; nor did it appear that Mr. Cuthell had any reason to suspect that Mr. Wakefield had become a writer upon any political topics, as the Bishop of Landaff, to whom he was publishing a reply, had written largely upon theological subjects.

The reply to the Bishop of Landaff was not printed by Mr. Cuthell, but by a Mr. Hamilton, a printer, employed by Mr. Wakefield himself, who directed some copies to be sent, for sale, to Mr. Cuthell's shop, as he had always been the publisher and seller of his many classical works. Mr. Cuthell began to sell them without due examination, but instantly stopped the sale upon the first intimation of the nature and character of the work.

The Indictment against Mr. Wakefield, the author, and

against Mr. Cuthell, the bookseller, were appointed on the same day, the 21st of February, 1799, for trial; and Mr. Cuthell being to be tried *first*, and *Mr. Wakefield* being to make his *own defence* as the author, Lord Erskine appears to have taken his stand for Mr. Cuthell upon his *particular situation*, contending, that having always been the publisher of Mr. Wakefield's works upon subjects of ancient learning only; and that this pamphlet being brought to him by Mr. Wakefield himself, without any notice of so great a change of subject, he had suffered it to be sold *upon the faith of Mr. Wakefield's character, and the abstract nature of all his other works, without suspecting that the subject was political, much less seditious*; the shopman who was called as a witness, having sworn that it would not otherwise, under his general instructions, and the nature of Mr. Cuthell's business, have found any entrance into the shop. To confirm this defence, Mr. Wakefield, the author, was called by Mr. Cuthell, but declined answering, as it might criminate himself. How the exculpation of Mr. Cuthell could have criminated Mr. Wakefield, beyond the writing of the book, of which the Crown was known to have had full proof, and which was not afterwards denied by Mr. Wakefield in his own defence, it is not easy to understand; but Mr. Wakefield had a most unquestionable right to refuse the aid of his testimony to Mr. Cuthell, whose case, however, suffered considerably from the want of it.

As the law stands at present, from a current of authorities it is undoubtedly *not* competent to any Judge trying an Information, or Indictment for a libel, to give any other direction to a Jury, than that a publication, though proved to have been sold by a servant, *without knowledge of the master*, involves the master in all the criminal consequences of the publication, and subjects him to an Information or Indictment, as a treasonable, seditious, or malignant publisher, as the

case may be ; and Lord Ellenborough, therefore, upon a late trial, could give no other opinion to the Jury at Guildhall, than that which was delivered by his Lordship. But surely it may well deserve the consideration of Parliament, whether the case of printing or publishing a libel should be left, as it is, such an anomaly in the law, and that Juries should be called upon to pronounce, on their oaths, that a Defendant published treasonably, seditiously, or malignantly, who was from accident, or, if you will, even from negligence, unconscious of the existence of the publication, which constitutes his crime.

It is true that this case of mere negligence without evil intention is difficult of proof. Yet it occurs frequently, and should be distinguished from a criminal publication ; and the distinction would be most easy consistently with all the rules of criminal law.

If the negligent publication of a libel, *though without criminal intention*, ought to continue to be an anomaly, and to subject the *negligent* publisher to an Information, or Indictment, as well as to an action for damages ; why ought not the law to be so declared or enacted, or even without declaration or enactment, such Informations and Indictments be drawn with distinct counts, or charges ; *one* charging the *criminal* intention, so as to identify the criminal publisher with the author, and *another* charging a *negligent* publication, by which the crimes which are extremely different, and the punishments which ought to be equally so, would be distinguished from each other ; whereas, according to the present course of proceeding, a mere *negligent* publisher must be found guilty of an Indictment, charging a criminal publication only ; and, after conviction, stands before the Court (as the case may be), as a treasonable, seditious, or malignant publisher, and cannot be received to mitigate his sentence as having been *negligent only*, being estopped by the record of

the conviction; although the Judges, from humanity and justice, are every day obliged, *in the teeth of the record*, to mitigate, by a side-wind, the judgments of the law, upon principles which the law does not openly sanction. It is this anomaly which so often entangles the consciences of Juries, and will continue to do so till the case is duly considered by the Legislature, and the question, one way or the other, set at rest. From the same anomaly, the Rev. Mr. Bate Dudley, was acquitted as not being a criminal publisher, many years ago, Lord Erskine and Mr. Pitt, then at the Bar, being his Counsel. But the acquittal was against the opinion of Lord Mansfield, who wholly over-ruled Lord Erskine's argument, and directed the Jury to convict.

All that Lord Erskine *then* and in the following case of Mr. Cuthell appears to have contended for, is, that if a negligent publication be an indictable offence, the party should be *so charged*, and ought not to be convicted on a count, which charges a CRIMINAL intention, which he is in a condition to negative by satisfactory proof.

A further evil, indeed, and no small one, attends the practice of not distinguishing the *criminal* from the *negligent* publication by distinct charges in the Indictment. Judges and Juries will occasionally differ totally from each other. If the Juries finding verdicts of acquittal in such cases, against the opinion of the Judge, are considered by the public, or any part of it, to have acted improperly, the trial by Jury suffers in proportion; and if, on the other hand, such Juries are considered to have properly resisted the opinion of the Judge (although the Judge had no jurisdiction to give a contrary opinion), the judicial authority then suffers in public estimation; whereas the constitution of the country actually depends upon the utmost reverence for, and confidence in, the administration of justice in all its parts, which never existed in any country in the world in such purity as in our own.

THE KING *v.* JOHN CUTHELL.

February 21st, 1799.

I RISE to address you, Gentlemen of the Jury, with as much anxiety as I have ever felt in the course of my professional life.—The duty I have to perform is difficult and delicate.—I am Counsel for Mr. Cuthell *only*, who is charged merely as publisher of a writing, for which the Reverend Gentleman now in Court (*and who is to plead his own cause*) is immediately to be tried, on another Indictment, as the *author*. The rules of law would entitle Mr. Cuthell to a *double* defence; he might maintain the innocence of the *book*, because *his* crime as *publisher* can have no existence unless the matter be criminal which he has published; and supposing it to *be* criminal, he might separate himself, by evidence, from the criminal purpose charged upon him by the record.—The first of these offices he must not be supposed to shrink from because of its difficulty, or from the force of the verdicts which the Attorney-General has adverted to as having been given in the city of London; Mr. Johnson, who was *there* convicted, stood in the ordinary situation of a bookseller selling a book in the course of his trade:—on that occasion I thought myself bound to make the defence of *the book*; but the defence of a *book* may be one thing, and that

of its publisher another.—There can be no proceedings IN REM by an Attorney-General against *a book*, as against tea or brandy in the Exchequer.—The *intention of the author and of each publisher* involves another consideration, and it is impossible to pronounce what opinion the Jury of London might have held concerning the book, if its author had been to lay before them his own motives, and the circumstances under which it was written. Even after Mr. Cuthell shall be convicted from my failing in his defence (a supposition I only put, as the wisest tribunals are fallible in their judgments), the verdict ought not in the remotest degree, to affect the Reverend Gentleman who is afterwards to defend himself.—*His* motives and intentions will be an entirely new cause, to be judged of as if no trial had ever been had upon the subject; and so far from being prejudged by other decisions, I think that, for many reasons, he will be entitled to the most impartial and the most indulgent attention. These considerations have determined me upon the course I shall pursue.—As *Mr. Cuthell's* exculpation is by disconnecting himself wholly from the work, as a CRIMINAL publisher from his total ignorance of its contents, and, indeed, almost of its existence, I shall leave the province of its defence to Mr. Wakefield himself, who can best explain to his own Jury the genuine sentiments which produced it, and whose very deportment and manner, in pleading his own cause, may strikingly enforce upon their consciences and understanding the truth and integrity of his defence. Observations from *me* might only coldly anticipate, and perhaps clash

with the arguments which the author has a just, natural, and a most interesting right to insist upon for himself.

There is another consideration which further induces me to pursue this course. The cause, so conducted, will involve a most important question as it regards the liberty of the press; because, though the principles of criminal and civil justice are distinguished by as clear a boundary, as that which separates the hemispheres of light and darkness, and though they are carried into daily practice throughout the whole circle of the law; yet they have been too long confounded and blended together when a *libel* is the crime to be judged. This confusion, Gentlemen, has not proceeded from any difficulty which has involved the subject, because, of all the parts of our complicated system of law, it is the simplest and clearest; but because POLITICAL JUDGES, FOLLOWING ONE ANOTHER IN CLOSE ORDER, and endeavouring to abridge the rights and privileges of Juries, have perverted and distorted the clearest maxims of universal jurisprudence, and the most uniform precedents of English law.—Nothing can establish this so decisively as the concurrence with which all Judges have agreed in the principles of *civil* actions for libels, or slander, concerning which there never has been a controversy, nor is there to be found throughout the numerous reports of our Courts of Justice, a discordant case on the subject; but in *Indictments* for *libels*, or, more properly, in *Indictments* for *political* libels, the confusion began and ended.

In the case of a *civil* action throughout the whole

range of civil injuries, the master always is *civiliter* answerable for the act of his servant or agent; and accident or neglect can therefore be no answer to a Plaintiff, complaining of a consequential wrong. If the driver of a public carriage maliciously overturns another upon the road, whilst the proprietor is asleep in his bed at a hundred miles distance, the party injuring must unquestionably pay the damages to a farthing; but though such malicious servant might also be indicted, and suffer an infamous judgment, *could the master also become the object of such a prosecution?* CERTAINLY NOT.—In the same manner, partners in trade are *civilly* answerable for bills drawn by one another, or by their agents, drawing them by procuration, though fraudulently, and in abuse of their trusts; but if one partner commits a fraud by forgery or fictitious indorsements, so as to subject *himself* to death, or other punishment by Indictment, could *the other partners* be indicted?—To answer such a question here would be folly; because it not only answers itself in the *negative*, but exposes to scorn every argument which would confound Indictments with civil actions. WHY then is *printing and publishing* to be an exception to every other human act? WHY is a man to be answerable *criminaliter* for the crime of his servant in this instance more than in all other cases? Why is a man who happens to have published a libel under circumstances of mere accident, or, if you will, from actual carelessness or negligence, but *without criminal purpose*, to be subjected to an infamous punishment, and harangued from a British Bench as if

he were the malignant author of that which it was confessed before the Court delivering the sentence, *that he never had seen nor heard of*. As far, indeed, as damages go, the principle is intelligible and universal, but as it establishes *a crime*, and inflicts a punishment which affects character and imposes disgrace, it is shocking to humanity and insulting to common sense.

—The Court of King's Bench, since I have been at the Bar (very long, I admit, before the Noble Lord presided in it, but under the administration of a truly great Judge), pronounced the infamous judgment of the pillory, on a most respectable proprietor of a newspaper, for a libel on the Russian Ambassador, copied too out of another paper, but which *I myself* showed to the Court by the affidavit of his physician, appeared in the *first* as well as in the *second* paper, *whilst the Defendant was on his sick bed in the country, delirious in a fever*. I believe that affidavit is still on the files of the Court.—I have thought of it often—I have dreamed of it, and started from my sleep—sunk back to sleep, and started from it again. The painful recollection of it I shall die with.—How is this vindicated? From the *supposed* necessity of the case.—An Indictment for a LIBEL is, *therefore*, considered to be an anomaly in the law. *It was held so undoubtedly*; but the exposition of that *error* lies before me; the Libel Act lies before me, which *expressly*, and *in terms*, directs, that the trial of a libel shall be conducted *like every other trial for any other crime*; and that the Jury shall decide, *not* upon the mere fact of *printing or publishing*, but upon the *whole matter put*

in issue, i. e. the publication of the libel WITH THE INTENTIONS CHARGED BY THE INDICTMENT.—This is the rule by the Libel Act; and *you*, the Jury, as well as the Court, are bound by it.—What, then does the present Indictment charge?—Does it charge that merely Mr. Cuthell *published*, or *negligently* published, the reply to the Bishop of Landaff?—No. It charges, “*that the Defendant, being a wicked and seditious person, and malignantly and traitorously intending to secure the invasion of Great Britain by the French, and to induce the people not to defend the country, had published, &c.*” SETTING FORTH THE BOOK.” This is the charge, and *you* must believe *the whole complex proposition* before the Defendant can be legally convicted. No man can stand up to deny this in the teeth of the Libel Act, which reduces the question wholly to the intention, which ought to be a foundation for their verdict. Is your belief of negligence sufficient to condemn Mr. Cuthell upon this Indictment, though you may discredit the criminal motive which is averred? The best way of trying that question, is to find the negligence by a special verdict, and *negative* the motives *as alleged by the Indictment*; do that, and I am satisfied.

I am not contending that it may not be wise that the law should punish printers and publishers even by way of Indictment, for *gross* negligence (*crassa negligentia*), because of the great danger of adopting a contrary rule. Let it, for argument's sake, be taken that such an Indictment may, even as the law stands, be properly maintained; but, if this be so, why should

not the Indictment, in conformity with the universal rules of pleading, charge such negligence by a distinct count?—Upon what principle is a man, who is guilty of *one* crime, to be convicted, without a shadow of evidence, or in the teeth of all evidence, of *another* crime, greatly more heinous, and totally *different*?

If upon a count charging a *negligent* publication, a publisher were convicted. he could only appear upon the record to be guilty *from negligence*; but, according to the present practice, the Judge tells the Jury, that though a Defendant has only been *negligent*, he is guilty upon the whole record, which charges a treasonable, seditious, or malignant intention; and after such a conviction, when he appears in Court to receive judgment, and reminds the Judge, who inveighs against his traitorous, seditious, or malignant conduct, that the evidence established his *negligence ONLY*; he is instantly silenced, and told that he is estopped by the record, which charges a publication with these mischievous intentions, and of which entire charge the Jury have found him guilty. I appeal, boldly, to the truly excellent and learned Chief Justice, whether this be conformable to the precision of the English law in any of its other branches, or to the *justice* of any law throughout the world.

But it has been said, and truly, how is the intention to be proved but by the act? I of course admit that the intentions of men are inferences of reason from their actions, *where the action can flow but from ONE motive, and be the reasonable result but of ONE INTENTION*.—Proof of *such* an action is undoubtedly most

convincing proof of the only intention which could produce it; but there are few such actions; nor, indeed, scarcely any human conduct which may not, by circumstances, be qualified from its original *primâ facie* character or appearance. This qualification is the foundation of all defence against imputed crimes. A mortal wound, or blow, without adequate provocation, visible to a Grand Jury, is a just foundation for an indictment of murder; but the accused may repel that inference, and reduce the crime from murder to manslaughter, or to excusable, and even to justifiable homicide. Mr. Cuthell asks no more:—he admits that on the evidence *now* before you he ought to be convicted, if the book is in your judgment a libel; because he stands before you as a publisher—and may be, therefore, taken to have been secretly connected with the author, or even to be the author himself:—but he claims the right of repelling those presumptions *by proof*; and the only difference between the Crown and me, will be, not as to the existence of the fact on which I rest my defence—but *whether the proof may be received as relevant, and be acted upon, if believed by you, the Jury*. I am sorry to say, Gentlemen, that it is now become a commonplace position, that printers and booksellers are answerable for simple negligence; yet no Judge, in my hearing, has ever stated that *naked proposition* from the Bench; it has been imputed as the doctrine of the Noble and learned Judge: *when and where* he delivered it I am ignorant—he has, on the contrary, tried Indictments on the principles of the Libel

Bill, before the Libel Bill existed; and on these principles Stockdale was tried before him, and acquitted. Where a printer, indeed, has printed, or a bookseller has sold a book, written by an unknown or unproduced author, and cannot bring any evidence in his defence—he must, to be sure, in common sense, and upon every principle of law, be criminally responsible, if the thing published be a libel; *but not for negligence only*, but as criminal in the full extent of the Indictment.

A publisher, indeed, though separated in *original* intention from the criminal motives of the author, may be found to be responsible in law, for the publication upon the legal presumption that he had *adopted the criminal sentiments of the author, and criminally circulated them by printing or publication*. But such a conviction does by no means establish the proposition, that *innocent* printers or publishers, *where they can show their innocence*, are criminally responsible *for negligence only*. On the contrary, it proceeds upon the criminality being *prima facie* established by the act of publishing in cases where the printer or publisher cannot show the negligence or accident which had led to the publication; *but where such mere negligence or accident can be established to the satisfaction of a Jury, which not very often can be the case*, the criminal inference is then repelled, and the Defendant ought to be entitled to an acquittal. The numerous convictions, therefore, of publishers *upon the mere act of publication*, establish no such proposition as that which the Attorney-General has contended for; because such publishers were convicted of the criminal

intentions charged in the Indictment, *not* upon the principle of criminal responsibility for an act of *neglect* only, but because it could not be established, *in these cases*, that the act of publishing arose from *negligence only*. By the act of publishing matter from whence a criminal intention results, as an inference of reason, and, therefore, as an inference of law, the criminal mind is *prima facie* fairly imputable; and in the absence, therefore, of satisfactory evidence on the part of the Defendant to repel the criminal conclusion, the guilt is duly established; but, then, this is not doctrine applicable singly to libels—it applies equally to *all crimes* where the most innocent man may be convicted, if from unfortunate circumstances he cannot repel the presumptions arising from criminating proof. But the doctrine which I shall ever oppose, as destructive of every human security, and repugnant to the first elements of criminal justice, is this, *that THOUGH the Defendant, taking upon himself the difficult, and frequently impossible proof of accident or oversight, should be able to convince the Jury* that he never saw the matter charged to be a libel—that it was imposed upon him as a work of a different quality—or, that he was absent when a servant sold it, and to which servant he had not given a general license to sell every thing which was brought to him—and who, moreover, could fortify the proof of his innocence by his general deportment and character; yet, that such a publisher *must* nevertheless be found guilty as a *malignant* publisher, by virtue of an abstract legal proposition—this I deny—and have, throughout my whole profes-

sional life, uniformly denied. It never has been adjudged in such a shape as to be fairly grappled with. I positively deny such a doctrine, and I am sure that no Judge ever risked his character with the public by delivering it as law from the Bench. The Judges may have been bound at *Nisi Prius*, as I admit they are, to decide according to the current of decisions. I will meet my Learned Friend, the Attorney-General, in the Lords' House of Parliament on that question, *if you, the Jury, will assist me with the fact to raise it by finding as a Special Verdict—"That the book, if you* " *please, was a libel—that Mr. Cuthell, the Defendant,* " *published it, but that he published it from negligence* " *and inadvertency, WITHOUT THE MOTIVES CHARGED* " *BY THE INDICTMENT."*—If you, Gentlemen of the Jury, will find such a verdict, *I will consent never to re-enter Westminster Hall again, if one Judge out of twelve will, upon a writ of error, pronounce judgment for the Crown.* The thing is IMPOSSIBLE; and the Libel Act was made for no other purpose than to suppress doctrines which had long been branded as pernicious and destructive to public freedom and security. The Libel Bill was passed to prevent trials of libels from being treated as *an anomaly in the law*, and to put them on a footing with all other crimes; and no crime can possibly exist *when the intention which constitutes its essence, can be separated from the act—"Actus non facit reum, nisi mens sit rea."* If a man, *without knowing the King*, were to give him a blow, which might even endanger his life, could he be convicted of compassing and imagining the death

of the King under the statute of Edward III. ? *Undoubtedly not*—because the *compassing* or *intention* was the *crime*, and the blow was only the overt act from whence the compassing was to be a legal inference, unless the Prisoner repelled it by showing the circumstances of the *accident* and *ignorance* under which he assaulted the King. I of course admit that it is not necessary to prove that a publisher had seen the book he published: for if he authorizes his servants to publish *every thing without examination*, it would be sufficient proof, in the judgment of a Jury, according to circumstances, that he was the wilful and criminal publisher or author himself, or secretly connected with the author, and criminally implicated in his guilt. But the present question is, whether, *if he can convince you, the Jury, of his innocence, you are still bound to convict him under an imperative rule of law, though you believed his mind to have been unconscious of the crime imputed by the Indictment.*

If a man were to go upon the roof of a house in the Strand or Fleet Street, and throw down large stones upon the passengers below, it would undoubtedly be murder, though a stranger only were killed, against whom no particular malice could possibly be suspected ; *i. e.* it would be murder, if the facts were returned to the Judges by special verdict. But would a Jury be bound to convict him, even though they were convinced *by the clearest evidence*, that he had mistaken the side of the house, and from inadvertence had thrown the stones *into the street, instead of on the other side, which led to an unfrequented spot?* This

proof might be *difficult* ; but if *the proof existed*, and the Jury *believed it*, WOULD IT BE MURDER ? Common law, common sense, and common humanity, revolt alike at the idea.

The Attorney-General has admitted the true principle of the liberty of the press, as it regards the quality of a publication. He has admitted it, greatly to his honour, because he is the first Attorney-General who ever, to my knowledge, has so *distinctly* admitted it. He has, indeed, admitted the true principle in the very way I have always understood it in most of the criminal prosecutions which, in my time, have been the subject of trial. The questions have always arisen on the application of the *principle* to *particular cases*, and that is the sole question to-day. He has admitted that every subject has a clear right freely to discuss the principles and the forms of the government, to argue upon their imperfections, and to propose remedies ; to arraign, with decency and fair argument, the responsible ministers and magistrates of the country, though not to hold them up to general, indiscriminating execration and contempt :—and he has admitted also, that it is the office of the Jury to say, within which of the two descriptions any political writing was to be classed. This admission comes strongly in support of *publishers*. For if an author could not write legally upon any such subjects, publishers ought then to reject the book altogether upon the very view of the subject as collected from the title-page, without advertng to the contents. But if writings respecting our government, and its due administration, be unquestionably legal, a

general bookseller has no such reserve imposed upon him from the *general subject of the work*, and must read his whole library in a perpetual state of imprisonment *in his shop*, to guard him from perpetual imprisonment *in a gaol*. If he published for instance, the Encyclopædia of Paris or London—and in the examination of all science and of all art in such a stupendous work, there should be found, even in a single page or paragraph, a gross attack on religion, on morals, or on government, he must be presumed to be malignantly guilty, and (according to the argument) *not primâ facie merely*, but *conclusively*, to be the criminal promulgator of mischief, with mischievous intentions. Surely this can never be even stated in a court of justice. To talk of arguing it, is ridiculous. Such a person might, indeed, be *primâ facie* liable; and I admit that he is so; but, surely, a Court and Jury are invested with the jurisdiction of considering all the circumstances, and have the right of judging according to the just and rational inferences arising from the whole case, whether he was intentionally mischievous. This is all I contend for Mr. Cuthell; and it is a principle I never will abandon—it is a principle which does not require the support of the Libel Act, because it never has at any time been denied. When Lord Mansfield directed the Jury to convict Mr. Almon as the criminal publisher of Junius, he told them that if Junius was a libel, the guilt of publishing was an inference of law from the act of publication, *if a Defendant called no witnesses to repel it, and that no witnesses had been examined by Mr. Almon.*

But he admitted, *in express and positive words*, as reported by Sir James Burrow, in the fifth vol. of his Reports, “*That the publication of a libel might, by circumstances, be justified as legal, or excused as innocent, by circumstances to be established by the Defendant’s proof.*” But according to the arguments of to-day, no such defence is admissible. I admit, indeed, that it is rarely within the power of a printer or publisher to make out such a case by adequate evidence; insomuch, that I have never yet been able to bring before a Jury, such a case as I have for Mr. Cuthell. But the rareness of the application renders it more unjust to distort the principle by the rejection of it, when it justly applies.

Having now laid down the only principle upon which Mr. Cuthell can be defended, *if the passages in the book, selected by the Indictment, are libellous*, I will now bring before you Mr. Cuthell’s situation, the course of his trade and business, and his connexion, if it can be called one, with the work in question.

Mr. Cuthell, Gentlemen, is not at all in the situation of many equally respectable booksellers; the course of whose trade, at the other quarters of the town, in the transitory publications of the day on all subjects, exposes them to the hourly risk of prosecutions on the most solid principles of law without almost the possibility of such a defence as Mr. Cuthell has to lay before you. They who wish to mix in the slander, the fashion, and the politics of the day, resort for newspapers, and pamphlets, to those gay repositories, filled with the active, bustling, and ambitious men of the world. In those places nothing is read or talked of

but what is happening at the very moment ;—a day generally consigning to oblivion, domestic events, however singular or afflicting ; even the revolutions of empires giving place in a week to newer topics—even to the favoured pantomime of the day. The bookseller who stands behind such a counter, collecting and exposing to view whatever may be thrown upon it, without perusal or examination ; who can have no other possible reason for supposing that he sells no libels, except the absurd supposition that no libels are written—such a man is undoubtedly *prima facie* criminally responsible ; a responsibility *very rarely to be successfully repelled*. Sale of a libel by the master of such a shop, however pure in his morals, *without the most demonstrative evidence on his part to repel the presumption arising from the act*, is unquestionably evidence of publishing the book in the criminal acceptance of publication, because, *in the absence of such evidence*, he is justly taken to be the author himself, or acting in concert with him in giving currency and circulation to his work. I pray you, Gentlemen, to recollect that neither *now, nor at any former period*, have I ever disputed a proposition built upon reason, and matured by decisions into law. But Mr. Cuthell's shop is of a directly opposite description, and gives support to the evidence, by which I mean to repel the criminal presumption arising, *prima facie*, from the act of publication.

He resides in a gloomy avenue of Holborn. No coloured lamps or transparent shop-glasses dazzle the eye of vagrant curiosity, as in the places I have alluded to. As in the shops of fashion nothing scarcely is

sold which the sun has gone down upon, so in *his house* nothing almost is to be seen that is not sacred to learning and consecrated by time.—There is not a greater difference between Lapland and Paris, than between the shops I have adverted to, and that of Mr. Cuthell. There you find the hunter after old editions; the scholar, who is engaged in some controversy, *not* concerning modern nations, but people and tongues which have for centuries passed away, and which continue to live only in the memory of the antiquary. While crowds in the circles of gaiety or commerce are engaged at other libraries in the bitterness of political controversy, the pale student sits soberly discussing at Mr. Cuthell's, the points of the Hebrews or the accents of the Greeks. Mr. Cuthell, Gentlemen, takes no personal merit from this distinction from other booksellers. It is not from superior taste or virtue, or from prudent caution, that he pursues this course, but because he finds his profit in adhering to a particular and well-known branch of bookselling, as every man will always find the surest profit in sticking to his own line of business. We lawyers find our profit, for the very same reason, in practising in one Court instead of scouring Westminster Hall; because men are supposed by their steadiness to one object, to know what they are about.

When I shall have made out this situation of Mr. Cuthell, and have shown his only connexion with the work in question from his literary connexion with its learned author, I shall have made out a case which

will clearly amount to a legal defence as an innocent publisher.

I proceed to this defence with the greatest satisfaction, as it is not only without possible injury to the Defendant, but in every possible event must contribute to his safety. If I succeed, I am at no man's mercy ; if I fail, even the very unsuccessful approach to a legal justification will present a case for mitigation, which the candour and justice of my Learned Friend will undoubtedly respect.

Mr. Cuthell had been applied to by Mr. Wakefield near a year before this little sudden performance had an existence, to sell *all his works* which had been sold before by a most respectable bookseller who had just retired from trade. It is but justice at once to Mr. Wakefield and to Mr. Cuthell, to say that the works of the former, which were numerous, were exemplary for their piety and learning, and that the character of the author fully corresponded with the inferences to be collected from his publications. He was a most retired and domesticated scholar, marked and distinguished by a warm and glowing zeal for the Christian religion ; and what removed him from every possible suspicion in the mind of Mr. Cuthell, or of any man living, as being engaged in schemes for the introduction of anarchy and irreligion, his most recent publications, which had been committed to Mr. Cuthell for sale, were his answers to Mr. Paine's attack upon the doctrines of Christianity, which Mr. Wakefield had not merely refuted by argument, *but stigmatized*

in terms of the justest indignation. This scorn and resentment at the works I have alluded to, was surely a full earnest of opinions which characterized a friend to religion, to harmony, peace, and good-will to men ; and Mr. Cuthell knew at the same time when the selling of this Reply to the Bishop of Landaff was first proposed to him, that Mr. Wakefield had before written to him on subjects of religious controversy, and that that excellent Prelate held his general character in respect. There is nothing, therefore, upon earth, which amounts even to incaution in the little which follows to complete the statement of his case.

Mr. Wakefield having printed the pamphlet by Mr. Hamilton, his own printer, without the smallest previous communication with Mr. Cuthell, he brought him the form of the advertisement, when it was ready for sale, and desired him to send it for insertion in the newspapers marked in the margin of it ; and, at the same time, desired Hamilton, his printer, to send the books, *already printed, to his shop.* This was over-night on the 31st of January. Some of the books were accordingly sent over-night, and the rest next day.

The advertisements having appeared in the morning papers, Mr. Cuthell was, of course, applied to for them by booksellers and others, and sold them accordingly, *not* because he sold *every thing*, much less works on *political subjects* ; and, least of all, by unknown authors ; but because his mind was fully prepossessed, that the work he was selling, was *an added publication to the long catalogue of Mr. Wakefield's*

other writings, the character of all which for learning and morals had been universally acknowledged, and whose character for both had ever been undisputed. The book having become offensive, Mr. Cuthell was put in process by the Crown, and the service of it on his person was the *first* intimation or suspicion he had that the book was different from the many others which he had long been in the course of selling without offence or question. It is scarce necessary to add, that he then discontinued the sale, and sent back the copies to the author.

This, Gentlemen, is the case as it will be established by proof. I shall not recapitulate the principle of the defence which you are already in possession of, much less the application of the evidence to the principle, which appears to me to be self-evident, if the principle can be supported ; and if it be denied or disputed, I only desire to remark, that no person in my station who has ever made a point, desiring the law to be reserved to him, has ever been refused by the Noble and Learned Judge : I mean the right of having the facts found by special verdict, that the law may be settled by the ultimate jurisdiction of the country ; because Judges at Nisi Prius must follow the current of authorities, however erroneous the sources of them may be. *If you, the Jury*, therefore, shall, from the evidence, believe that Mr. Cuthell was innocent in intention, you may find *the publication*, and *negative the intention* charged by the record ; by doing which, if the Defendant be legally guilty, the Crown, notwithstanding that negative, will be entitled to judg-

ment ; whereas, if you find a general verdict of Guilty, the term Guilty, in the general finding, will comprehend your opinion of the criminal intention charged, though it was not your intention to find it ; and Mr. Cuthell will not be allowed to controvert that finding as a fact, although you, the Jury, actually rejected it ; his guilt being part of your verdict, and conclusive of the intention which you disbelieved.

With regard to the book itself, though I leave its defence to its eminently learned author, yet there are some passages which I cannot help noticing.—(*Here Lord Erskine commented upon several of them, and then concluded as follows.*) I was particularly struck, indeed, that the following passage should have made any part of the Indictment : “ *We, sons of peace, or see or think we see, a gleam of glory through the mist which now envelops our horizon. Great revolutions are accomplishing ; a general fermentation is working for the purpose of general refinement through the universe.*”

It does not follow from this opinion or prepossession of the author, that he therefore looks to the consummation of revolutions in the misery or destruction of his own country ; the sentiment is the very reverse : it is, that amidst this continued scene of horror which confounds and overwhelms the human imagination, he reposes a pious confidence, that events, which appear evil on the surface, are, in the contemplation of the wise and benevolent Author of all things, leading on in their consequences to good, the prospect of which Mr. Wakefield considers “ *as a gleam of glory through*

“ *the mist which now envelops our horizon.*” I confess, for one, that, amidst all the crimes and horrors which I certainly feel mankind have to commiserate at this moment, perhaps beyond the example of any former period, crimes and horrors which, I trust, *my* humanity revolts at as much as any other man's, I see nothing to fear for our country or its government, not only from what I anticipate as their future consequences, but from what they have produced already : I see nothing to fear for England from the destruction of the monarchy and priesthood of France ; and I see much to be thankful for in the destruction of papal tyranny and superstition. There has been a dreadful scene of misfortune and of crime, but good has, through all times, been brought out of evil. I think I see something that is rapidly advancing the world to a higher state of civilization and happiness, by the destruction of systems which retarded both : the means have been, and will be, terrible ; but they have been, and will continue to be, in the hand of God.—I think I see the awful arm of Providence, not stopping short here, but stretched out to the destruction of the Mahometan tyranny and superstition also.—I think I see the freedom of the whole world maturing through it ; and so far from the evils anticipated by many men, acting for the best, but groping in the dark, and running against one another, I think I see future peace and happiness arising out of the disorder and confusion that now exists, as the sun emerges from the clouds : nor can I possibly conceive how all this ruin, falling upon tyrannous and blasphemous establishments, has the remotest bearing

against the noble and enlightened system of our beloved country.—On the contrary, she has been the day-star of the world, purifying herself from age to age, as the earliest light of heaven shone in upon her ; and spreading, with her triumphant sails, the influence of a reformed religion, and a well balanced liberty throughout the world. If England, then, is only true to the principles of her own excellent constitution, the revolt of other nations against their own systems cannot disturb her government. But what, after all, is my opinion, or the judgment of the Court, or the collective judgment of all human beings upon the scenes now before us ? We are like a swarm of ants upon an ant-hill, looking only at the surface we stand on ; yet affecting to dispose of the universe, and to prescribe its course, when we cannot see an inch beyond the little compass of our transient existence. I cannot, therefore, bring myself to comprehend how the author's opinion, that Providence will bring, in the end, all the evils which afflict surrounding nations, to a happy and glorious consummation, can be tortured into a wish to subvert the government of his country.

The Attorney-General has admitted—I notice it to his honour, because all Attorney-Generals have not been so manly and liberal—the Attorney-General has admitted that he cannot seek, in this land of liberty, to deny the right of every subject to discuss, with freedom, the principles of our constitution—to examine its component parts, and to reason upon its imperfections, if, in his opinion, imperfections are to be found in it. Now this just admission cannot be qualified

by a harsh and rigorous scrutiny into the language employed in the exercise of this high and useful privilege. It never can be said that you may tickle corruption with a straw, but that you must not shake it at its root. The true criterion, therefore, comes round again, at last, to *the MIND and INTENTION*, which, by taking the whole work together, and the character of its author into consideration, it is *your* office to determine ; and the concluding sentence of this publication, in which Mr. Wakefield must candidly be supposed to have summed up the purpose and application of his work, is quite decisive of its spirit and purpose, viz. that instead of looking to new sources of taxation to support the continuance of *war*, the safety of our country would better be consulted in making an effort towards *peace* ; which, if defeated by the fraud or ambition of our enemy, would unite every heart and hand in our defence. Hear his own concluding words :—"RESTORE the spirit of your constitution, correct your abuses, and calm your temper ; " THEN (and surely they, who have been successful in " their predictions through all this conflict, have more " reason to expect attention to their opinions, than " those who have been invariably wrong), THEN, I " say, solicit peace ; and, take my word for it, the " French Republic, so far from insisting on any " concessions of humiliation and disgrace, will come " forwards to embrace you, will eagerly accept your " friendship, and be proud of a connexion WITH THE " FIRST PEOPLE IN THE UNIVERSE. Should I be " mistaken in this event, and have formed a wrong

“judgment of their temper and designs, *still the*
“*good effect of this advice will be an inestimable*
“*acquisition—a vigorous and generous UNANIMITY*
“among ourselves.”

In the defence I have made, there are but few passages I have noticed; respecting those, I am entitled to the protection of your candour; but you are not to conclude that the others are indefensible, because I do not defend them—the defence of the book (as I before observed to you) being placed in other hands more fit to manage it, and it would have been out of my province, in Mr. Cuthell's case, to have entered more at large into the subject.

LORD ERSKINE'S SPEECH

IN THE

CASE OF THE EARLDOM OF BANBURY.

THE case of the Earldom of Banbury, with which we shall conclude the Legal part of this Work is so well known that in presenting our readers with Lord Erskine's masterly argument, nothing need be said by way of Introduction. The Argument itself, embracing as it does every legal point of that most difficult Case, proves, after years of relaxation, the unimpaired powers of its noble author's mind.

LORD ERSKINE.

NOTWITHSTANDING all that has been urged by the Noble and Learned Lords opposite, I adhere to the opinion I expressed at an early period of this debate. I admit that the claimant labours under great disadvantage. The facts involved in his case are extraordinary, and the grave has long since closed over all the individuals whose evidence could afford him any assistance. His claim is almost as old as the patent of his ancestor, and successive generations have passed away without a recognition of it by this House. Yet time would be the instrument of injustice if it operated to raise any legal bar to the claimant's right. Questions

of Peerage are not fettered by the rules of law that prescribe the limitations of actions, and it is one of the brightest privileges of our order, that we transmit to our descendants a title to the honours we have inherited or earned, which is incapable either of alienation or surrender. But I will go further, and assert that lapse of time ought not in any way to prejudice the claimant, for what laches can be imputed in a case where there has been continual claim? Nicholas, the second Earl of Banbury, presented his petition as soon as there was a monarch on the throne to receive it, and a series of claims have been kept up by his issue to the present hour.

It appears to me of the first importance, that the law by which this case is to be decided should be accurately laid down. The facts of the case are only of importance with reference to the law, and any conclusion that may be drawn from them, which is not applicable to the law, is equally idle and irrelevant. If a former Committee endeavoured in their resolutions on this claim to distinguish the law from the fact, they cannot be too severely censured, as nothing could be more opposed to justice than such a distinction. Legitimacy in law and legitimacy in fact cannot be at variance; they are in every respect identical, and the apparent ground of distinction between them originates in an erroneous notion of the idea they purpose to convey. Legitimacy is the creature of law, and the term has no other meaning than that which is affixed to it by law. It is the designation of a particular status, the qualities of which have been enumerated and de-

fined by law, as best adapted to preserve the order and security of society. When a question of legitimacy arises, and the claimant has proved the facts which constitute his legal title, whatever suspicions may exist to the contrary, the verdict must be given in his favour. These facts may be very far from convincing the Judge that the claimant was actually begotten by his ostensible father : yet the Judge has no alternative, for the claimant has fulfilled the conditions prescribed by the law. The province of the Judge has been circumscribed by the lawgiver, and it would be a breach of his duty were he to extend his inquiry beyond the limits within which the question is confined.

The rules relating to the bastardy of children born in wedlock may be reduced to a single point, *i. e.* that the presumption in favour of the legitimacy of the child must stand until the contrary be proved, *by the impossibility* of the husband being the father ; and this impossibility must arise either from his physical inability or from non-access. It has been urged that strong *improbability* is sufficient, but this I confidently deny. We do not sit here to balance probabilities on such a topic as this. We must not forget that the real matter in controversy is of a very peculiar nature. Suppose two horses and one mare in the same pasture-ground, and no other horse could obtain access. The mare foals. If it were a question of property to ascertain by which horse the foal had been begotten, the party would succeed that could show the greater number of probabilities in its favour : the colour, the shape of the foal, and whether the mare had been with one horse

more than with another, would come into consideration. But it is not so with the human species ; we stand on a higher ground. The obligation and contract of marriage being the source and fountain of all social ties, the law feels itself bound to give confidence to persons so connected, and rejects the imputation of a breach of contract, unless it be proved in either of the ways above mentioned. The coverture creates the presumption of access, and access is synonymous with sexual intercourse, except in the cases of physical inability. It is vain to say, that the presumption of sexual intercourse, ought to yield to evidence which shows the fact to be highly improbable. The fact is a necessary concomitant to the status, therefore the presumption would be incontrovertible, unless certain exceptions to it had been created by law. A presumption, as long as it stands, is equivalent to proof ; indeed, proof is nothing more than a presumption of the highest order. Even the physical inability, by which the presumption of sexual intercourse may be encountered, is only a simple presumption. I cannot contemplate a case where physical inability can be made the subject of demonstration. Men of science, from their observations on the human body, may be able to satisfy their minds of the existence of the physical inability, but in our inquiry into it we must go by the ordinary rules of nature. An infant of seven years of age was lately exhibited that apparently possessed the powers and capacity of manhood ; but if this monster had been married, would the issue of his wife have been held legitimate, in opposition to the established pre-

sumption of law with reference to infants of that age ? Unquestionably the presumption would prevail. A chain of evidence may be perfect though every link of it is not equally perceptible. In murder, you must prove generally how the deceased came by his death, as by poison ; but it is not necessary to give evidence of his having drunk the draught ; so in arson, it is not necessary to see the torch put to the dwelling. Having laid down these rules, which the law has established for the protection of this very helpless class of the human race, I take it upon me to say, that to make a child that is born in wedlock legitimate, *there is no necessity to prove actual intercourse* ; for legitimacy is the inevitable result of access, save where the law has established certain exceptions. These principles are unshaken, and while they remain so, the exceptions which rest on the same grounds cannot be extended.

The nature of the presumption arising from the access of the husband being ascertained, it is evident that if access can be proved, the inference from it is irresistible, whatever moral probability may exist of the adulterer being the father ; whatever suspicions may arise from the conduct of the wife, or the situation of the family, the issue must be legitimate. Such is the law of the land. Women are not shut up here, as in the eastern world, and the presumption of their virtue is inseparable from their liberty. If the presumption was once overthrown, the field would be laid open to unlimited inquiries into the privacy of domestic life : no man's legitimacy would be secure, and the

law would be accessory to the perpetration of every species of imposture and iniquity.

The civil law regards the presumption arising from access as insurmountable, except on proof of physical inability. Our law fully supports the principles I have laid down. The rule is not only given by Lord Coke, but by succeeding writers. In the case of *Hospell v. Collins*, Lord Hale held that the issue to the Jury was confined to the question of access. In *Pendrell v. Pendrell*, the sole subject of discussion was the access. It was proved that the husband and wife had lived apart, that in fact the presumption of access could be met by proof of non-access. In the case of *Thompson v. Saul*, in which I was counsel, the evidence against the legitimacy was not confined to the reputation of three generations to the adultery of the wife, and to the treatment of the child. The great point was the non-access. The husband lived in Norwich, and the wife in London, and the other circumstances all tended to controvert the access. It was strictly a case of non-access.

Mr. Beachcroft has furnished me with an accurate account of a trial which lately took place at Welshpool, in which the sole question was the legitimacy of a child named Lloyd. The husband was a lunatic; the wife lived in adultery with a Mr. Price, who was proved to have slept with her at the time when the issue was supposed to have been generated. The counsel dwelt strongly on the state of the husband and the adulterous intercourse of the wife. But there was no proof

of non-access, and it was imperative on the jury to find for the legitimacy.

The same doctrine was followed by Lord Ellenborough in the case of *Boughton v. Boughton*. It is a case almost parallel to the present. In the year 1774, Salome Kay, the wife of a person in very humble life, left her husband, and became the mistress of Sir Edward Boughton. From that time she continued to live under the protection, and wholly at the expense of Sir Edward, and she ceased to hold any intercourse with her husband, or to bear his name, having resumed that of Davis, which was her maiden name. In March 1778, she was delivered of a girl, who was baptized and registered by the name of 'Eliza, daughter of William and Salome Davis.' (William Davis, the brother of the mother, being a servant of Sir Edward Boughton.) Sir Edward brought up and educated Eliza Davis as his child; and by his will, dated on the 26th of January, 1794, he devised considerable estates to her, by the description of his daughter Eliza, for her life, and after her decease to the heirs of her body in tail general, provided she married with the consent of her guardians, and the husband she married should take upon him the name of Boughton. After the death of Sir Edward, in 1798, Miss Davis, being still an infant, presented a petition to the Chancellor, stating that she was about to intermarry with Colonel Braithwayte; and as her guardians were not competent to consent to her marriage, *she being an illegitimate child*, she prayed that Ann E. and Richard

S. might be appointed her guardians, to consent to her marriage. The Chancellor, by an order, dated the 9th day of August, 1798, granted the prayer of the petition; the guardians were appointed, and the marriage solemnized by licence. Doubts were afterwards raised on the legality of the marriage, upon the ground *that Miss Davis could not be considered an illegitimate child, Mr. Kay, the husband of her mother, having been alive at her birth, and therefore her legal father, and the only person qualified to consent to her marriage.* The Court of Chancery directed an issue to ascertain whether the marriage was legal, and the Court of King's Bench decided that it was not. The only question in the cause was the illegitimacy of Miss Davis, and stronger circumstantial evidence of that fact could not perhaps be brought forward in a case of this description. The separation of the husband and wife, the intercourse of the latter with Sir Edward Boughton, and the recognition of the child by that gentleman, were fully established. The baptismal register, the conduct of the mother, the reputation of the world, and the proceedings in Chancery, marked her as an illegitimate child. The single circumstance of the mother's husband being alive was all that could be urged to the contrary. The legal presumption in favour of legitimacy wrung a verdict from the jury, which no one can doubt they would gladly have withheld.

From these principles, supported by these cases, I infer that without proof of non-access, the presumption derivable from access must be conclusive.

Such is the law of England as it existed from early times to the present hour. I am not here to defend the law, but to administer it. Perhaps the lawgiver may have laid down a rule not always infallible; he may in some instances have diverted hereditary wealth from its proper channel, by enriching the fruit of an adulterous intercourse; and he may thus have created the relation of parent and child where it had no real existence. In my opinion, these occasional and very rare deviations from justice amount to nothing more than the price which every member of the community may be called upon to pay for the privileges of an enlightened code. No laws can be framed sufficiently comprehensive to embrace the infinite varieties of human action; and the labours of the lawgiver must be confined to the developement of those principles which constitute the support and security of society. He views man with reference to the general good, and to that alone. He legislates for men in general, and not for particular cases. No one can doubt that the interests of society are best consulted, by making a question of such frequent occurrence as legitimacy, to rest on a limited number of distinct facts, easy to be proved, but not to be counterfeited, instead of leaving it to be the result of inference from a series of indefinite facts, separately trifling, and only of importance collectively from the object to which they are applied. Marriage and cohabitation afford us a more sure solution of the question of legitimacy than we could arrive at by any reasoning on the conduct of the husband and wife. The conduct of Lord and Lady Banbury

may be satisfactorily accounted for by the supposition that Nicholas was considered illegitimate by his mother ; but if she cohabited with Lord Banbury, at the time of the conception, she may have been mistaken in her judgment of the father to whom she assigned the child ; and it would be monstrous that the status of any individual should be left to the determination of the very party who is expressly disqualified by law from giving any evidence on the subject.

This was the policy of the law ; and when it appeared to be manifestly unjust in an individual case, the Legislature interposed by a special Act, the effect of which was confined to the party who was the object of it. Several of these Acts may be found on the records of this House ; but none of them were passed, except under circumstances which left no doubt that the husband was not the father of the child proposed to be bastardized. I need not observe that these Acts are not declaratory of the law ; they create exceptions from the law, otherwise they would have been unconstitutional encroachments upon the functions of the ordinary courts of justice, and an abuse of the jurisdiction of the House. A rule is often ascertained by knowing the exceptions to it. These Acts constitute an unanswerable argument to show, that had the legitimacy of Nicholas laboured under even more serious imputations than have been raised against it, the law would still have protected it : and nothing short of the special interposition of the Legislature was capable of invalidating it. The act passed to bastardize the children of Lady de Roos, expressly mentions that

the said Lady Ann had left her husband's house, and lived in notorious adultery, and had been delivered of three male children, which children thus notoriously begotten in open adultery, 'by the laws of this realm are or may be accounted legitimate,' &c. Who can say, in opposition to such a declaration of the law in an Act of Parliament, that Nicholas,, who was born when his mother, far from having abandoned her husband, was living upon the most affectionate terms with him, ought to be accounted illegitimate? Indeed, the very Bill which was read to bastardize Nicholas, recites, that he was born under circumstances that make him legitimate: a recital which is fully confirmed by the recitals in former Acts, of a similar description, and by the authority of every case in which either before or since, the same question has been brought under the consideration of a legal tribunal.

I admit that the presumption of access may be combated by proof of impotency; but what evidence is there of Lord Banbury having been impotent? There is no statute of limitations on the powers and faculties of man. Instances of robust longevity might be cited still more extraordinary: Sir Stephen Fox married at the age of seventy-seven, and had four children; the first child was born when the father was seventy-eight, the second and third were twins, in the following year, and the fourth was born when the father was eighty-one. The Earl of Ilchester and Lord Holland can vouch for the accuracy of this statement, and I believe their genealogy has stood hitherto unquestioned. Parr became a father when even his son was of a more

advanced age than Lord Banbury. Moreover his Lordship seems to have kept all his faculties both of body and mind in full exercise. Not only does it appear, from the evidence of one of the witnesses, that he went out hawking up to his death; but the Journals of the House furnish us with the best evidence of his attention to more important matters. There are several entries about 1627 of excuses for the absence of Peers, but Lord Banbury's name does not occur amongst them; and when the practice of noting Peers who were present, by prefixing the letter *c* to their names, was resumed in 1628-9, I find that the Earl of Banbury is so distinguished on the 21st of January, and appointed on a Committee for the Bill to preserve His Majesty's revenue. On the 20th of February he is appointed on a Committee for the defence of the kingdom, and he appears to have been in his place on every other day during the session, except once or twice, when his absence is accounted for by sickness. The Parliament was dissolved on the 10th of March, and no other called for twelve years; in the meantime he died.

I shall not travel through the various acts of Lord Banbury's life, from which it has been inferred that the birth of these children was concealed from him. The instances of human caprice and infatuation that pass daily before our eyes, lead me to regard this conclusion as more specious than correct. It is an abuse of reasoning to apply it to such a case as this, for we are not to infer that certain acts were done because they ought to have been done. We must observe also

that the acts of Lord Banbury all prove that his fondness for his wife, and his intercourse with her, continued up to the hour of his death. If they lead to an inference of non-access in one view, they destroy it in the other. The concealment of Lady Banbury's pregnancy is perfectly consistent with the existence of the access, and even of the sexual intercourse. One fact however has been overlooked, which somewhat relieves her Ladyship from this imputation. She appeared, along with Lord Banbury in open court, for the purpose of levying a fine of Caversham, only a few months before the birth of Nicholas, when her pregnancy could scarcely have been overlooked by her husband.

I do not attach much weight to either of the Inquisitions; they were *exparte* proceedings in an inferior court, liable to be quashed or superseded at any subsequent time. There are instances of a series of Inquisitions alternately establishing and controverting the same fact; and no one can examine the records, without being satisfied that they constitute evidence of a very secondary description, which has deservedly fallen into disrepute.

The evidence received by the Committee in 1661 has been treated by some of the noble Lords with great severity. Due allowance has not been made for the imperfect state in which it has come down to us. Neither the questions nor the answers are fully reported; for instance, Ann Delavall is reported to say, that 'she knoweth him to be the son of William Earl of Banbury, being present at his birth;' and in a sub-

sequent answer to the question, whether Earl William saw the child, she says, 'I was not there to know it.' Now it is evident, that the first answer referred to the birth of Edward, and not of Nicholas. She was probably interrogated respecting both the children in the order of their birth. If she had referred to Nicholas instead of William it would have been unnecessary to say Nicholas Earl of Banbury, in her answer to the second question ;—she would have said 'him,' as she does in her answer to the first question. I may add, that the word 'Edward' is at the end of the line which precedes her examination, as if he was the subject of her examination. With this key the whole of the evidence is consistent and satisfactory. The woman had been present at the birth of the eldest son, and her connexion with the family being altered before the birth of his brother, she only knew of the birth of the latter by report, though she could speak positively of his being regarded by Lord Banbury as his child. Mary Ogden was his nurse for fifteen months, but it does not appear from how soon after his birth. She does not know whether Lord Banbury ever saw him. But when it is considered that we are ignorant whether she was his wet-nurse, and whether Lady Banbury might not have been jealous of her interference, it would be bold to presume that Lord Banbury *could* not have seen the child without her knowledge. The evidence of Ann Read requires large interpolations to make it intelligible. The last two answers are obviously in the wrong order. Edward Wilkinson was called to speak to the facts sub-

sequent to Lord Banbury's decease, and having never known Nicholas until that time, there is nothing extraordinary in his ignorance, whether Lord Banbury knew that he left any issue. I really cannot partake of the scepticism which has been expressed by some noble Lords respecting this evidence, and I am confident that had the whole of it been preserved, their impression would have been very different. The facts deposed are conclusive, unless you impeach the veracity of the witnesses. The cohabitation of Lord and Lady Banbury, the birth of the child, his recognition by Lord Banbury are all fully established. The counsel might safely say, as they did, that they had cleared the title. It is true Lady Salisbury was not called, but she was summoned, and her absence cannot be construed into an imputation against the title of Nicholas, as her husband was his next friend in the suit instituted in Chancery, for perpetuating the evidence in his favour. The servants were more likely to know what passed in the family upon such an occasion, than persons of a higher station; and it argues no small confidence in his cause, that the claimant should bring them forward. The questions addressed to these witnesses came from the Attorney-General, and it was his duty to elicit the truth, and to present it to the House in such a shape, as to admit of no misconstructions. An examination conducted under his auspices, ought to be regarded strictly, and no facts should be established by way of inference, when they might have appeared on the face of the examination itself. If the House wanted further evidence, why did

they not call for it, for they had the power and opportunity of doing so? More than twenty individuals were then alive, competent to prove what was the general reputation in the family, and in the world. The register of baptism, indeed, never existed, as Lady Banbury was a Catholic, and her child was probably christened in private, by a priest of her own persuasion.

I do not mean to contend for the immaculate virtue of Lady Banbury. She may have sinned with Lord Vaux and fifty other Lords; but if her intrigues were carried on at the time she cohabited with her husband, the legitimacy of her child is unblemished. She evidently was a very imprudent woman; and scandal may have been busy with her fame, both before and after Lord Banbury's decease. Her early marriage with Lord Vaux must have deeply prejudiced her son in public estimation, and it may have deterred him from taking those steps for the recovery of his property, which would obviously have been beneficial to him. Lady Banbury had certainly never been convicted of an adulterous intercourse with Lord Vaux, and she might have dreaded an exposure, which would have deprived her of her station in society. The provision made by Lord Vaux for Nicholas must have been an additional consideration for his abstaining from a step which would probably have been fatal to the peace of that nobleman, as well as of Lady Banbury. It must not be overlooked, that so far was Nicholas from being in affluent circumstances, he was a very distressed man.

These are not the only parts of the conduct of

Nicholas which have been brought forward by the adversaries of the claim. He has been traced from his cradle to his grave, and every period of his life has been scrutinized in order to procure evidence of his illegitimacy. The dim twilight of two centuries has gathered round the events of his obscure career, and prevents us from forming a correct estimate of either their intrinsic or relative importance. If, indeed, we could transport ourselves to the troubled times in which he lived, we might venture to draw inferences from the vicissitudes of his domestic history: but it is now become a most fallacious experiment. Why is the bounty of Lord Vaux to his step-son to be ascribed to another motive, than what belonged to such a relationship? Why is it to be assumed that he has repudiated the title of Banbury, because he had been called in his earliest childhood by the name of Vaux? Why should it not, with equal justice, be assumed that his legitimacy was fully acknowledged, because in the licence to travel given to his mother by the Protector, the terms are, 'to Lady Banbury and her son,' the natural description of a widow and her infant; and because, in the leave of absence granted to Nicholas by the House, as well as in the Act passed for the sale of Boughton Latimer, Nicholas is mentioned as Earl of Banbury; and on various trials of property in which he was concerned he always received the same title? These are weak arms to encounter a presumption so strong as that which exists in favour of legitimacy. It would have been most unjust, upon such slight grounds, to pass a special Act to bastardize the child;

and attempts of this description have failed when they were much better supported. One case occurred highly encouraging to him in the very Parliament to which he submitted his claim, and there can be no doubt that the Act introduced to bastardize him was withdrawn upon the first reading, from the disapprobation naturally excited by so harsh and unjust an exercise of power.

I trust, my Lords, that I have established that the opinion of the Law entertained by the Committee in 1661 was well founded, and that Nicholas, the original claimant, ought to have been admitted to the full enjoyment of the privileges of this Earldom. The same rights have descended to the present petitioner, and I trust they will be recognized by your Lordships.

SPECIMENS

OF

LORD ERSKINE'S PARLIAMENTARY SPEECHES.

LORD ERSKINE'S Parliamentary Speeches are given very briefly in this work, for two reasons; first, from the great eloquence and uncommon aptitude for argument in his forensic Speeches, some of those in Parliament, when compared with them, appear tame and uninteresting—consisting for the most part of matters of fact, little or no opportunity being afforded for that impassioned style so unapproachably his own; and secondly, from the great labour he underwent in his profession during the day, his physical power became unequal to such intense fatigue. Evidence of this occurs in one of his earliest Speeches, viz. “On the Abatement of the “Impeachment of Warren Hastings by a Dissolution of Parliament.” After not a very long speech, “he was compelled to postpone his argument, being overpowered by “fatigue consequent on his exertions in the Courts of Law “during the day.” With this Speech, the first of any magnitude delivered by him in Parliament, we commence the following Specimens rather than Reports.—ED.

DEBATE IN THE HOUSE OF COMMONS
ON THE ABATEMENT OF THE
IMPEACHMENT OF WARREN HASTINGS,
BY A DISSOLUTION OF PARLIAMENT.
December 17th, 1790.

MR. ERSKINE, after complimenting Mr. Burke on the wit and eloquence of his speech, said,

If it were my purpose, to endeavour by argument to negative the resolution proposed by the Right Hon. Gentleman, I should better know my station than to present myself to the House in the very front of the debate ; I should have contented myself with supporting my opinion, whatever it might ultimately be, in some later stage of the argument, after its foundations had been laid by persons of greater parliamentary experience, and possessed of more leisure to investigate so complicated a subject, and of such infinite magnitude and importance. I can, therefore, assure the House, that it is from an unfeigned sense of my own inability and want of preparation, when compared with the difficulty and probable consequences of the business we are engaged in, that leads me to offer myself to the chairman's notice before the discussion has been advanced in, in order the more seasonably to suggest the propriety of deferring the decision, and appointing a committee to search for precedents on the subject ;

by which course alone an assembly so very popular can come to a decision with the precision necessary on such a momentous occasion, and consistently with that dignity which they ought always to preserve in the eyes of the public which they represent.

It is the invariable practice of both Houses of Parliament to search for precedents on all subjects of deliberation, where the resolutions of either House may be expected to guide or influence the decision; and that mode has recently been adopted, almost as of course, on a subject of the greatest concern indeed, but not of greater novelty and difficulty than the present. I am further prompted to the motion I mean to make, for searching precedents by the language of the Right Hon. Gentleman who moved the resolution; for though, for the reasons assigned by him he did not detail the principles or precedents on which his resolution was founded, yet he informed the House, that he had sought its foundation in every extant record, and history, and had collected the information of every mind capable of adding new lights to his own upon the subject. These were, indeed, necessary preparatives; but it should be remembered, that if they exist, as I have no doubt they do, with the Right Hon. Gentleman who framed the motion, they are equally necessary for the members of the House who are to decide upon it. Minds with such lights and information as belong to the Right Hon. mover, few, indeed, if any, could boast of; but that reflection rather adds to the propriety of

suffering others to collect materials for judgment, and to obtain time for deliberation.

In reflecting on the fittest mode of endeavouring to convince the House of the expediency of appointing the committee which I shall move for, a dilemma presents itself.—If, on the one hand, I should rest the fitness of my proposition on general observations, without investigating the precedents which create the doubts and difficulties of the question, I might fail in impressing the House that any doubts or difficulties exist: and if, in avoiding that failure I should enter at large into the precedents I have examined, it might be objected to me that I have myself exhibited the materials which I am praying leisure to collect. I shall, however, pursue the last as the properest course, not thinking that my particular possession of the precedents will remove the necessity of a committee to search for them; for how can the House take my collection, without examination, to be authentic, or be sure there are not many others behind, which are still unexamined and unknown.

Much of the debate may, besides, turn on the classing and recollecting and comparing of dates, and upon a critical examination of the very wording of the different authorities and resolutions, which no human mind can anywhere manage without notes of them, far less in the collision of such a debate in an assembly so numerous and fluctuating as the House of Commons.

Before, however, I have recourse to the few precedents I have seen on the subject, a great preliminary

question presents itself: on the due consideration of which, all their validity undoubtedly must depend, viz. by what rule, and upon what principles the subject is to be investigated; or, to speak more plainly, is it a question of privilege to be decided by expediency, or a question of law to be determined by rule? No man prizes more highly the privileges of the Commons than myself; my short political existence in a former Parliament was begun and ended in a struggle to preserve them; I maintained them under the auspices of my most excellent friend near me, (Mr. Fox) and I return to my seat again with the same principles.—But the question now before the House is, in my mind, totally foreign to every principle of privilege. It appears to me to be a pure question of law, and which the rules of law can consequently alone determine. It is to give to all the subjects of England, under the fixed standard of the law, the possession of life, property, freedom, and reputation; by this all the privileges of the House of Commons have been for ages directed; by these privileges, the rights, and liberties of the subject have been, one after another, maintained and enacted into law, in different ages of our history; and God forbid that after they have been thus gloriously fought for by our patriot ancestors in that place, they should be at once set loose again by the House in the meridian of its authority, giving law to a court of justice, and dictating the state of its own prosecution to those judges appointed by the constitution to decide it.

The objection I have to the resolution is, that it

appears to me to be judicial. If the motion had been for the appointment of managers, on the principle that the House would not entertain doubts of the existence of its own prosecution, but would consider the continuance of it as of course, leaving the Lords to decide on it as a matter of judicature, much less objection could have been taken to that course of proceeding; but the resolution seems to presuppose doubts of the continuance that have never been stirred, and quiets them by a resolution that the impeachment is now pending. This seems not only the assumption of judicial authority, but a declaration which may pledge the House to give it more than judicial effect. My apprehension is, not the consequence of any loss of privilege by a difference with the Peers, an apprehension vain and unfounded, but I think that the Commons of Great Britain, by the weight of their high privileges, should rather be anxious to uphold the course of law, and give support to the balance of the state, than to exert them against the one or the other.

I will now proceed to lay the foundation of my argument, by maintaining that the present state of the impeachment, be it what it may, is a pure question of law; to be decided by the House of Lords, sitting as a court of impeachment on the inquisition of the Commons; a Court, to all intents and purposes, as much an English Court of criminal law, as the Court of King's Bench, or the quarter sessions of any county in the kingdom. It is impossible to deny this, without insisting that the Magna Charta of the kingdom

and the thirty statutes confirmatory of it, are all repealed: or at least, that though existing for subordinate purposes, they can, in the present instance, be made to bend to the will of one branch of the legislature. The first struggles of our ancestors were to fix deeply and immoveably the root of all sound and rational liberty, by bringing justice, criminal and civil, to a precise standard: arbitrary, anomalous proceedings, by which the subject was questioned before jurisdictions not defined by law, and exposed to trials and judgments ascertained by no legal standard, was the great vice of the ancient government of England: and the grievance which first called forth the spirit and wisdom of the founders of the constitution to put an end to these worst of evils, and to bring the enjoyment of life, property, and liberty, within the plain, unequivocal protection of positive law, was the very object of the Magna Charta, and was amply secured by the twenty-ninth chapter, which enacts, that no man shall be taken, or imprisoned, or deprived of any property, privilege, or franchise, but by the judgment of his equals, or the law of the land. Under such alternative, therefore, every English trial must be had; a jury of equals must decide in all cases on the life or person of an English commoner, unless where there are exceptions by immemorial custom, or positive statute; in other words, by the law of the land.

The trial by impeachment is one of these exceptions, and its only foundation must therefore be English law, and consequently the course of proceeding under it

can never be changed or abrogated by a resolution of the House of Commons, but must be changed alone by the entire legislature of the kingdom. This sacred security of the English government the Magna Charta first established ; and its thirty confirmatory statutes, with their strong, deep, and intertwined roots, bound fast the spreading tree of our liberties, often shaken, indeed, but never loosened, by the contending tempests of ages ; and the House of Commons has ever stood as a fence round it, and planted new laws for its shelter and preservation. The trial by impeachment established by the most ancient usage, is unquestionably an institution necessary for the preservation even of the laws themselves, and all the securities of the government ; but it was instituted by the same cautious wisdom, and tempered with that just and benevolent spirit, which so peculiarly characterizes English jurisprudence. In times when the power of the Crown and its subordinate executive magistrates would, without due check, have laid waste all the rights of the subject, and when even the judges of the law were but too often the subordinate engines of oppression, it became necessary to provide a tribunal where criminals could be questioned, whose authority or means of corruption might overawe or seduce the ordinary courts and ministers of justice. But though spurred on by necessity, no less than the support, or rather the existence of infant popular rights struggling in ancient times for self-preservation, but now established beyond fear or danger, even then mark the wisdom and providence of the founders of the consti-

tution; they did not forget the safety of the criminal, even in providing for the superior safety of the state. When they conferred an inquisitorial jurisdiction on one branch of the legislature, they recollected the overruling influence and authority of such an accuser, and therefore conferred the power of judicature upon a co-equal branch of the government, which, from being superior to awe or influence, actuated by different interests, and divided by dissimilar prejudices, was likely to hold even the balance of this necessary and superior court of justice. By this mode of considering the subject (and it was so considered by Mr. Justice Blackstone, and every other writer of authority) the trial by impeachment stands harmoniously consistent with the entire constitution, and with all the analogies of law. By this mode of considering it, it can alone be reconciled with Magna Charta; for though the party impeached was not tried indeed by his equals, because his equals are his accusers, yet he is still tried by the law of the land, the alternative in the wording of the statute, which he could not be if an impeachment were not a branch of the established criminal justice of England.

Besides this legal proceeding by impeachment before the peers of the realm, as a court of criminal law, it will appear, by an inspection of the ancient records of parliament, many of which I have examined, as collected by Lord Chief Justice Hale, in a manuscript printed by Mr. Hargrave, but not published, that the Lords anciently drew commoners before them on the accusation of individuals, contrary to Magna

Charta, and the various confirmatory statutes; that repeated complaints were made of these abuses by the Commons, and that at last they were declared to be utterly void, and were formally abolished by the statute, 1st of Henry 4th, chap. 14th. The Lords, however, for some time, seemed to have disregarded the statute, till upon a private impeachment of Lord Clarendon by Lord Bristol, the House of Lords referred the question to the judges, who declared such a proceeding, on the accusation of an individual, to be contrary to law, coming, as Lord Hale expressed it, in the 91st page of the work alluded to, within the 29th chapter of Magna Charta. "*Nec super eum ibimus, nec super eum ponemus.*" Lord Hale added, that from that time an impeachment by the Commons of Great Britain was the only case in which a commoner could be subjected by law to the judicature of the peers. Assuming, then, an impeachment to be a legal prosecution, on the accusation of the Commons before the Lords' House, can it be any longer a question, by which of the two Houses every matter that the accused has a direct interest in for his preservation, shall be adjudged? Common sense and common justice equally revolt at a judgment affecting the accused, delivered by the accuser. The court that is to judge him, can alone decide it; and it should be left to its decision, without being led to it by authority, influence, or fear, which are all alike hostile to the impartial deliberations of justice. If the Commons, therefore, on examination of the subject, shall have reason to think that, consistently with a series of former judgments of the Lords in similar

cases, a person impeached has a legal right to be dismissed from the impeachment by a dissolution of the Parliament, they ought studiously to forbear by an exercise of their own authority, to place any person accused by themselves, in a worse condition before his judges, than he might stand in without such interference; and rather repair the defect of the law by a prospective statute, than deprive an individual of the protection of it, by an *ex post facto* resolution.

It appears to me that the jurisdiction of deciding on the existence or state of the impeachment, as it may be affected by the dissolution of Parliament, is a question equally judicial, with any other that may occur in the course of trial. For that the Lords may be obliged to decide it upon the objection of the person accused. And I cannot conceive that the Commons have a privilege to affect the state of the prisoner in judgment. If the Lords, indeed, were, *mala fide*, to give a judgment hostile to the validity of an impeachment, and contrary to established rule and custom; which, in the absence of statute, can alone determine what is law; such a proceeding would deserve the most serious consideration, as a dangerous abuse of judicial authority. But still the question of judicature would not be changed, by the possibility of such a supposition, and it equally remains to be decided by precedent, what the custom and rule of proceeding has been, which established the law, for I never will admit that policy, however wise or expedient, however urgent, can alter the rule by which an English subject, under the English law, has an unquestionable privilege to be judged.

If the decision then is with the Lords, it is next to be examined by what rule it ought and may be expected to be decided by them; for that too must be settled before the precedents can be stated with effect. If the rules of decision are not to be found in Lords' Journals, where are they to be sought for, and what rule of law for the protection of the subject can exist? And is it to be believed, that after the virtue and wisdom of ages have been exerted for the security of the subject, against every species of arbitrary power and punishment; is it to be believed, that when the probability of oppression in accusations of state had reduced our ancestors to provide so many securities against vexation, in the course of trial, that they should purposely have left, without bounds or limits, an engine of power, highly necessary indeed, but like every other power that is not measured by law, destructive of all the happiness and security of life? I apprehend, therefore, that the Lords must govern themselves by the judgments of their own House upon similar occasions, and must deal with me, if I were placed before them, as they have dealt with others in judgment. A person accused, has, by the genius of the law, a right to come under the protection of technical and formal objections, even when he stands not within the reason of them, much more if the protection insisted on were found to be consistent with the whole spirit, and all the analogies of justice. The Court of King's Bench could not enforce Mr. Wilkes's outlawry, though valid in every substantial part, because the county court, where he was proclaimed and exacted, was not described upon the record with

the precision sanctioned by custom, though it is plain to a common reader, that it was described so as to be distinguished from any other. The first inclination of the mind opposes such a precedent; but the defeat of justice in that, or any other particular case, is never lamented beyond its measure by any wise man; because even when good judges must thus sometimes stand disappointed in the just execution of law, from the strictness necessary to the administration of it; the example forms an inexorable barrier against the inroads of power and tyranny, in cases where policy and expediency might easily be warped on the spur of occasions, to confiscate property, or to destroy liberty and life. I admit that the power of defeating an impeachment is an inconvenient and exceptionable prerogative of the Crown; but not more dangerous than many other prerogatives formerly belonging to the kings of England, which in subsequent ages have been taken away. But how taken away? Not by resolutions of their inexpediency, acted upon till the prerogatives were abandoned without statute, but by the regular course of legislation, the Commons employing the weight of their privileges to compel consent to a new and better rule of action, and not by destroying the sanctions of government, or beating down one dangerous power by the introduction of a greater. I, therefore, insist that the state of the impeachment must be decided on by the Court where the Commons by law have lodged it; and that the former judgments of that court of competent jurisdiction and an acquiescing legislature, constitute the law on the subject. By an acquiescing legislature, I mean, that

when a series of judgments, by a court of competent jurisdiction, *a fortiori*, of a court in the last resort, has established any rule of decision, every subject has a right to the benefit of it in judgment while the rule remains in existence, unreversed by the authority of Parliament; and, therefore, I shall venture to consider that the solution of the question (let it be discussed where it may) depends wholly on the judgments of the Lords in similar instances, to be collected from their different acts, as found in the Journals of that House.

MR. ERSKINE, having thus laid what he called the foundation of his argument, and having discussed the abatement of writs of error in Parliament, by the common law, before 1673, was advancing to the precedents, when, owing to his fatigue in the courts, in the earlier part of the day, and the intense heat of the House, he told the Chairman that he was unable to pursue his argument.

Dec. 22.—The order of the day for going into a Committee to take into farther consideration the state in which the impeachment of Warren Hastings, Esq. was left at the dissolution of the last Parliament having been read, and Sir Peter Burrell having taken his seat at the table, MR. ERSKINE rose to resume his argument, which had been interrupted by his illness on Friday. He said,

The course and turn which the debate has taken, since I had the honour first to address the House, gives additional force to my motion for the search of authorities applicable to the subject. If the House

had considered the matter as a mere question of privilege or of expediency, to be decided by their own will, and not by any rule of law, and upon that footing had considered it, as not depending at all upon any judgments of the House of Lords, such a course of proceeding, however improper, would have been, at least, an answer to my motion. But when from the highest authority in the House (the Speaker), who immediately followed me in the debate, not only volumes of precedents and records have been resorted to, but even common law judgments have been appealed to, which it cannot be supposed, the House in general is in any degree possessed of; it surely is an admission that by such criterions the question is to be judged, and renders the collection of them consistent not only with reason, but with the common practice of both Houses of Parliament, even on the subjects of less novelty and importance. The Right Hon. the Speaker has admitted that there is no precedent to be found previous to 1678, of an impeachment having survived a dissolution, and therefore not being able to establish that order, on the direct custom of Parliament, he has had recourse to the different precedents, which were collected by the committee in 1673, when the question concerning writs of error was before the House; but, besides that none of these precedents relate to impeachments by the Commons, all of them that were criminal proceedings, and not mere writs of error, were criminal appeals, directly contrary to Magna Charta, and the ancient statutes, persisted in, even after the statute 1st of Henry 4th, chapter 14th, and finally declared by the Lords, on reference to all

the judges, to be contrary to law, in Lord Bristol's charge of Lord Clarendon. Such precedents, therefore, even if applicable, can be no legal foundation for the short-lived order of 1678. I have to remark too, that in those cases, the Lords had given a day to the parties, in the succeeding Parliament, which they have omitted in the present instance, even if they have the power to give one; by which, according to all authorities, there is an incurable chasm in the proceedings. The party is, without day, in court, and his bail finally discharged from their recognizances, which went only to have him before *that* Parliament; I say, therefore, that Mr. Hastings is not bound to appear, nor have the Lords any process, that I know of, to enforce his appearance.—At all events, none to *continue* the proceedings, which were *discontinued* by no day having been given.—For this I refer to Hawkins's Pleas of the Crown, title, “Discontinuance,” where all the authorities are collected.

I now proceed to pursue the precedents. That of 1673, founded too on the anomalous and illegal proceedings alluded to, declares only that writs of error continue from session to session, and nothing farther was done on the subject till 1678, when the Parliament was dissolved subsequent to the imprisonment of the Popish lords, under the pretended plot. The nation, at that time, was wrought up to a pitch of frenzy concerning Popery, and upon that subject, neither the voice of reason nor law could be heard. The Lords and Commons, the accusers and judges of the Lords in the Tower, jointly examined Oates, and came to a resolution of the existence of the plot, on the sole

evidence of the person who could give it no existence but by his charge on the prisoners, who were afterwards to be tried before the Peers. I state this fact to show the disorder and irregularity that prevailed throughout this particular proceeding. On the 12th March, 1678, to give colour to the continuance of the impeachments, which by no resolution before that time had been voted to have continuance, it was moved to declare, that writs of error, which by the resolution in 1673 had been declared to continue from session to session, continued from parliament to parliament; and a committee was appointed to search precedents. This was evidently to give colour to what followed: for only two days after, viz. on the 17th of the same March, without doing any thing on the first order, it was added as an instruction to the committee to inquire also into the state of the impeachments brought up in the last parliament; and in two days afterwards, report was made to the House, that “on perusal of the journal “of the 29th March, 1673,” which, as had been shown, applied only to the continuance of writs of error from session to session, and without search of *any other authority, or statement* of any one principle, they reported that the state of the impeachments brought up in the former parliament was not altered, and the Lords agreeing in this report, made the order of 1678. This order, therefore, was established upon no antecedent custom of parliament, but stood on a most strained and forced analogy to writs of error, which writs of error, it is notorious, never did continue from parliament to parliament, till the existence of the order

in question, as appears by the authority of Lord Hale, and Lord Coke, and a decision of all the judges. Temp. Charles 1st.

To prove that this novel order was made on the spur of the occasion, I proceed to show the immediate and barbarous use which was made of it on the trial and execution of Viscount Stafford. Lord Nottingham, whose authority has been cited for the continuance of impeachments, was Speaker of the Lords on that trial, and kindly consented that Lord Stafford should have counsel, provided they did not stand near enough to prompt him, and the aged and infirm prisoner was refused the right of arguing the question, whether his impeachment had not abated. Perhaps, however, the managers of that day were right, when they objected to the admissibility of such argument, the existence of the order of 1678 : but for that very reason, if a good one, the argument now turns the other way, since the reversal of that order of 1678, by that of 1685. I will now state that reversing order, and the language of it should be attended to. It is not a resolution either in the abstract, or in a particular instance, that impeachments abate by the dissolution of parliament, leaving the order of 1678 still standing as an existing resolution, which might have left future times to cite one judgment against the other, as they happened to be most consonant to the opinions of those who adopted the one or the other in argument.—No, the order of 1685 entirely cuts down and annihilates the former ; the words of it are, “ Resolved, that the order of the 19th March, 1678-9, shall be reversed and annulled as to impeachments.”

If the Lords had jurisdiction to make the order of 1678, they had surely jurisdiction to unmake it; as the first stood on no antecedent custom or rule of practice; and therefore while the order of 1685 remains in existence, the matter is not debateable, and the Lords (let the Commons vote what they may) cannot, without an act of violence and caprice, refuse the benefit of it to any man standing before them in judgment. The question, therefore, is, whether the order of 1685 is now in force? As to that, I say, it stands *to this hour* on the Lords' journals from the time it passed, and no impeachment has continued from parliament to parliament. Persons impeached have, as will appear, been discharged from imprisonment on the footing of its existence, and under its direct authority; and the Commons, neither when it was passed, nor subsequently acted upon, have ever made the smallest objection of any invasion of their privileges, or invasion of the law.

Before I leave the order of 1685, I will take notice of Lord Anglesea's protest against it, stating, among other reasons, that it repealed the order of 1678, which was agreeable to the practice of all former times. I say, the assertion was as indecent in Lord Anglesea, as it was false; for it appears from the Commons' Journals, that this very Lord Anglesea, who was manager for the Lords in 1678, told the Commons, at the conference in the Painted Chamber, that in the continuance of the impeachments, the Commons had gained a great point, which, though not admitted by the Commons, showed the sense of this protesting Lord upon the subject. From

one part, however, of Lord Anglesea's protest, a good principle may be collected; for the Lords, as a court of law, ought to abide by rule, that the subject may know how to apply for justice. His argument was good, but his facts against him.

Having examined these two precedents of 1678, and 1685, I say that the true way of settling their authorities is, to examine what was done by the Lords themselves, and how they regarded them, the first subsequent time that the point occurred; *and, also to observe how the Commons behaved on the same occasion.* The next precedent, then, was of the Lords Salisbury and Peterborough, who were impeached of high treason in 1689. Parliament was dissolved in 1689, and a new one met in the same year. In 1690, these Lords petitioned to be discharged from their imprisonment, stating the dissolution of the parliament, and also a free and general pardon. The operation of the pardon was referred to the judges; and on their answer, the question being put for their discharge from imprisonment, it passed in the negative; and being then admitted to bail, they remained subject to the impeachment, till they were discharged wholly upon the search for precedents, and on the order of 1685. This is evident to whoever will look at the Journals, though it is not easy to show it to two hundred persons, who have not the precedents, *and who refuse to look at them.* After the answer of the judges, the matter of pardon was never discussed again; but the Lords assembled on the general question of the continuance of impeachments; a committee having before been

appointed to search precedents on the subject. It appears by the Lords' Journals of the 30th of March, 1690, that the committee on that day, reported, "That they had examined the Journals of the House, from their beginning in the 12th of Henry VII. and all the precedents of impeachments since that time, which were in a list in the hands of the clerk, and also all the precedents brought by Mr. Petyt from the Tower, among all which *none were found to continue from one parliament to another*, except the Lords, who were lately so long in the Tower,"—alluding to the popish lords who were kept there under the order of 1678, and afterwards discharged under the order of 1685, which annulled it. It was upon *this report*, and not on the footing of pardon, that Lords Salisbury and Peterborough were discharged. The entry mocks all argument; it is only necessary to read it. The words are, "after consideration of which report, and reading the orders made the 19th of March, 1678, and the 22nd of May, 1685, concerning impeachments, and long debate thereon, it was resolved that Lords Salisbury and Peterborough should be discharged from their bail;" and they were discharged accordingly. What farther shows that the pardon was no ingredient in the discharge, if the state of the proceeding were not in itself conclusive, is, that the pardon could not have destroyed the impeachment, even supposing the parties to be entitled to it; but must have been pleaded before the Lords in bar to it, and on which the Commons, according to every rule of law, as well as the most inveterate custom and privilege in

impeachments, must have been heard. Nothing remains to be said on this case but the conduct of the Commons. Their impeachment was put an end to, and the prisoner discharged without consent, message, or communication : and by a direct affirmance of the order of 1685, made on the face of the Lords' Journals ; *yet no resolution was come to in this place, nor any objection taken by anybody*, though this happened when the Commons were in high strength, and in the very day-spring of the revolution.

Before leaving this precedent, I will state an additional proof, that the Lords acted on the order of 1685 ; for it will appear, which I did not know myself till after coming down to the House, though I have searched, as I think, diligently, and which is an additional reason for deliberation on such a complicated subject, that a committee to search precedents was at the same time appointed, on the motion of other persons impeached, who were also discharged soon after, on the precedent of Lords Salisbury and Peterborough. It is the case of Sir Adam Blair, Mole, Gray, and Elliott, who were impeached about the same time with the two Lords. A committee was appointed to search precedents, on their application to the House of Lords ; and after continuing on bail, till after the discharge of Lords Salisbury and Peterborough, *they were also liberated without communication with the Commons, and without any subsequent objection or dissatisfaction* ; though all these proceedings were of the most public notoriety, and could not be unknown to the House of Commons of that day.

The Duke of Leeds' case in 1701, which follows next in order, and which has been relied on as in favour of the continuance, makes, I think, quite the other way.

After the articles had been brought up, and towards the close of the same parliament, the Lords, by message, reminded the Commons of their impeachment, and told them the session was drawing to its close. Soon after, the parliament was dissolved, and on the meeting of the new one, the Lords, without any new message to the Commons, dismissed the articles, entering on their Journals, that in the former parliament the Duke of Leeds had been impeached, articles brought up, and answer put in; but that the Commons not prosecuting, he was discharged. This failure of prosecution must have applied to the *expired parliament*; for if the impeachment had continued to the new one, a new message would have been sent, before the articles were dismissed for want of prosecution, according to a privilege always insisted by the Commons, that the Lords, on an impeachment, can take no step, *but in their presence*. The discharge was clearly, therefore, because the jurisdiction of the Lords was at an end, and not an act of judicature on a subsisting impeachment, as the Commons never made any complaint, as they did when Lord Somers was acquitted *in their absence*.

In the cases of Lords Somers, Oxford, and Halifax, the entries are similar to that of the Duke of Leeds, and are open to the same observation. But I come now to the last and only remaining precedent, of the Earl of Oxford, in 1717. That precedent establishes, beyond all question, what effect a dis-

solution was then supposed to have on an impeachment ; for if it had then been doubted, much more if it had been denied, that a dissolution would destroy an impeachment, it is extravagant to believe that Lord Oxford could have been advised to build a petition to be discharged, on the intervention of a prorogation only, even if a dissolution had been taken to be ineffectual ; and still more improbable that the Lords would have seriously entertained it, and searched for precedents on the subject. It is true that it was decided that the intervening prorogation had not terminated that impeachment, but the language of the Lords who protested against the decision, demonstrated that there was but one opinion concerning the effect of a dissolution ; for if the Lords who voted against the effect of the prorogation, had built their opinion on the denial also of the effect of a dissolution, the protesting Lords must have seen that the vote had been given on the reversal of the order of 1685 ; whereas they say, that as they, in opposition to the other part of the House, could see no difference between a prorogation and dissolution, they were afraid that the vote would tend to weaken the order of 1685 ; a language perfectly absurd, if they had conceived that the vote had been grounded on a reversal of it. The language of the protest was therefore plainly this : “ We are all agreed about the effect of a dissolution, which is the settled practice ; but this vote against the effect of a prorogation, which we cannot distinguish from a dissolution, may bring even that point into doubt, which was not meant to be questioned.”

I will now notice the cases at common law which

have been cited, particularly the case in Carthew, where Lord Holt is supposed to have decided that impeachments are not abated by dissolution. That case was an application by Lord Salisbury to the King's Bench to be bailed before the parliament met ; and he was properly told by the King's Bench, that being impeached of treason, he was not within the act of Habeas Corpus, and therefore not being, *de jure*, bailable, the rest was, of course, matter of discretion. The Court, indeed, then took notice that *commitments* of the Lords continued, notwithstanding a dissolution of the parliament. But the case cited for that doctrine was Lord Stafford's, *which was while the order in 1678 remained in force*, which beat down all subordinate or collateral opinions ; and besides that, the House of Lords, which alone had jurisdiction to decide upon the existence of the articles, made the decision, on the meeting of the parliament, in the very instance of Lord Salisbury, and without a murmur from the Commons, finally discharged that very impeachment which had been the subject of Lord Salisbury's application to Lord Chief Justice Holt. Lord Chief Justice Holt's opinion, therefore, on a collateral point too, and where the King's Bench had no jurisdiction, can never be opposed to the judgment of the House of Lords, which had jurisdiction, and which decided the very point in the very instance for which Lord Holt's opinion is cited. I rest, therefore, my argument on the principles I set out with : the judgments of the Court competent to decide, and an acquiescing legislature ; nay, what is stronger than both, *acquiescing accusers* : for, besides

that it has been admitted that no impeachments before 1678 appear to have been continued from parliament to parliament, the case of the Duke of Buckingham, in the time of Charles I. shows the sense of the Commons themselves on that subject. They had impeached the Duke, who had become universally odious; apprehending the loss of their proceedings by dissolution, they sent a remonstrance to the King upon the subject; but the parliament was, nevertheless dissolved.—The new one met, equally revengeful against Buckingham; yet, instead of going on with the impeachment, they addressed the King to remove him from his councils, on the imputation of the crimes charged by the former articles; but the impeachment was never mentioned again, not even in the debate.—It is worth observing, too, that Lord Chief Justice Coke sat in that parliament, who had been removed from his seat in the King's Bench by Buckingham, who had also made him sheriff, to prevent his return to parliament: yet it never occurred to that great lawyer, with all his resentments about him, to consider the prosecution as existing.

Having now stated the precedents, I may remark, that they all tend to the utter extinction even of the articles in the Lords' House, by the dissolution of parliament, without the right of proceeding, even *de novo*, on the trial; for in every one of the precedents, the articles were only carried up, and no proceedings were had in the original parliament which received them: and even the solitary order of 1678 did not declare that an impeachment in part proceeded upon, remained in *statu quo*, to be taken up again

without a recommencement of trial ; so far from it, that it appears to be worded to repel such a conclusion ; for though, in the very same order, the Lords declared, in the abstract, that writs of error, on which no trial could exist at all, to be broken and divided, continued from parliament to parliament ; yet, in the next line, when they came to *impeachments*, they studiously changed the style, and instead of declaring generally that impeachments also continued from parliament to parliament, they only resolved that the dissolution did not alter the state of those impeachments brought up in the preceding parliament ; a declaration which, as no trial had begun on them, cannot be brought to bear upon the present impeachment. — Leaving, therefore, the question of the total abatement to rest, for the present, upon the authority of the precedents only, though they may, in my judgment, be fortified by solid principles of law, a much greater question lies behind, which the resolution, though its meaning is avowed by its supporters, does not distinctly express, viz. Whether supposing the articles themselves do still remain of record untouched by the dissolution, *the proceedings upon them* exist in *statu quo* ? a position not only without support *from any one precedent*, but, I think, repugnant to every principle of English justice. — The particular convenience or inconvenience of Mr. Hastings, as to this particular trial, has nothing to do with the argument. I will examine it as it must affect the public and future ages.

In order to decide upon both the questions, *i. e.* either upon the existence of the impeachment at all

after a dissolution. or its existence in *statu quo*, if it still remain, the principles of English criminal law, and the rules of criminal trial in other cases, should be considered; because the constitution, in permitting the existence of a court of impeachment, as a supreme criminal court for high and extraordinary occasions can never have intended that it should bring all the other laws into disrepute, by an avowed departure from their principles, or deprive the subjects of England of the great protections of English justice, applicable to every other occasion.

I admit that the nature of the trial by impeachment deprives the accused of many advantages which the law has provided for the safety of accused persons in all other cases; and that therefore the reasonings from other proceedings will not closely apply; but in the absence of precedents, I think that the universal securities and sanctions of justice ought not to be farther violated, *than necessarily and unavoidably flows from the very frame and constitution of the court*; and that in considering whether the impeachment at all continues, or, if continuing, can go on in an uninterrupted course, the House ought eternally to keep in view the general principles of English criminal law and justice, and to apply them as far as precedent and sound analogy will support the application. I will bring in review before the House, the anxious solicitude of the constitution, which is but another name for the law, to protect persons accused from all vexation and oppression. The provisions which I will enumerate, and which my whole life has been spent in seeing carried

into daily effect, constitute the great characteristic of English liberty, established for ages, and which other nations are now struggling, through blood and confusion, to obtain.—It will be found, I am afraid, that an impeachment continuing, as is proposed and insisted on, violates them all.

The first security is, that persons accused shall be brought to a speedy, or rather an immediate trial, to avoid long imprisonment, and the anxious miseries of a doubtful condition. This is amply provided for by the act of Habeas Corpus, which enables a person arrested to call upon his accuser to bring forward his indictment the first session after his imprisonment, and to try him on it at the next; on failure of which, he is, in the first instance, entitled to bail, and in the last, to a final discharge from the accusation.

If some limitation had not applied to an impeachment, by its being a proceeding confined to a parliament, it appears strange that the provisions of that second Magna Charta were not extended to that case, or at least some convenient limitation enacted, consistent with that species of proceeding; for if impeachments may continue beyond one parliament, they may continue for life, and operate to perpetual imprisonment: and the liberty of the subject will no longer depend on the law, but on the will of one branch of the legislature.

The next great security is, that the persons appointed to try, are to be purged from all bias and prejudice, by the challenge of the prisoner. It is true, that the constitution of the court, where the judges sit by in-

heritance, or creation of the Crown, to a certain degree ousts this great privilege; but in one parliament, or in the course of trials in general, its operation in so large a body cannot be very dangerous: but if it can continue from parliament to parliament without limitation, the party impeached may come, at last, to be judged by strangers to his impeachment, and what is worse, even by his very accusers; who, going up from this House by succession and creation, would judge upon property and life, on their own accusation; yet without the possibility of challenge or objection from the accused. The law of England could never mean to subject any of its subjects to such a horrible inquisition. If, at the time of the Union, the legislature had thought that an impeachment could have had such continuance, it seems reasonable to suppose that a clause of disqualification would have been introduced, to prevent the peers of Scotland from sitting as judges on trials, the first parts of which they by no possibility could have heard.

The last great rule of English trial is, that the trial, once begun, shall go on without alteration or separation, to prevent impressions from any source but the evidence; that the evidence shall be given by the witnesses in presence of the prosecutor, the prisoner, and the court; and that the verdict shall be given on the recent view and recollection of it. Here again, the frame and constitution of the court of impeachment, to a certain extent, deprives the subject of these valuable privileges. But still, considering it as a trial in one parliament, the evil, though to be lamented,

has its limits. The prosecutors are the same: the court nearly so; and the evidence may, during adjournment or even prorogation, be, with the aid of notes, recollected; but what is the case when the parliament is dissolved? It cannot be said that the pendency of an impeachment should deprive the people of the free choice of their representatives; yet not one member of the former parliament might return, by election, to the new one. How, then, is such new House of Commons to proceed?

Suppose the former parliament to have been dissolved just when the accused had made his defence, and while the evidence on which his accusation rested was fresh in his own memory, and present to the recollection of the managers and the Lords, he had rested his whole defence on observations on that evidence, without calling witnesses; appealing to the honour of the managers for the truth of them, as well as to the justice of the House. Suppose, when he had thus finished, and had impressed even the Commons themselves with his innocence, the parliament had been dissolved; how, I say, could such a trial proceed in *statu quo*? Are the new Commons to reply to the prisoner, whose defence they had never heard? or is the prisoner to make it over again, when the foundation of it is forgotten, in order that the new Commons may hear it? And supposing he could do it, his defence would still be observations on evidence which the managers had never seen, and of which there was no record, and which, even if recorded, would be written evidence, contrary to the genius of English

law. Suppose even an interval of years to exist, which might often happen, between the giving of the evidence by the witnesses in one parliament, and the hour of deliberation and judgment in the next; and in a case, too, where a judgment of guilt or innocence might absolutely depend upon the most accurate recollection of the proofs; in what situation would the Lords and Commons stand upon such an occasion? The Lords who had sat from the beginning of the trial, must judge wholly from the unjudicial notes of a sleepy clerk, and with but a feeble recollection of the oral testimony; and the new Lords, open to no challenge, could judge from no other possible source, never having even seen the witnesses who delivered it. And in the same blind manner must the Commons demand judgment against a person whom the old Commons, who had heard the evidence, might have acquitted. By such rules of trial, I would not destroy the life of a sparrow, or even pluck a feather out of his wing. I should be glad to hear what the judges, as well as the Lords, would say to the case of a peer, indicted for murder in the King's Bench, and whose indictment was brought up by *certiorari* for trial, as it must be, into the Lords' House: if, pending such a trial, and when the most important witness was under cross-examination, the parliament were dissolved, would the witness be set up again, a twelvemonth afterwards, to go on with what he had been saying the year before? or would the trial begin *de novo*? I will rest this part of my argument on the answer which the Lords and judges would give to that

judicial question, where the Commons can have no pretence of privilege ; and if it be answered, that the trial should begin *de novo*, I wish to know upon what principles a Commoner should be exposed to dangers on an impeachment, which cannot belong to a peer, on an indictment for the highest crimes ?

[Mr. Erskine, in the same manner, supposed the interruption of the trial by dissolution, at all the different stages in which it might be so interrupted, and endeavoured to show the injustice that might flow from each instance.] He then said,—The closest analogies of law condemn this division of a trial ; for before the statute of Edward 6th, when the king died during a trial by indictment, even after conviction, no judgment could be given on that trial. All the proceedings fell to the ground, and the party was put to plead *de novo* on the indictment, still remaining of record. [For this he cited Lord Coke's Reports.]

Mr. Erskine concluded these and other observations by saying,—In the lapse of seven centuries, no criminal trial in any court has ever been interrupted, and taken up again in *statu quo* ; nor has any one impeachment ever been so continued from one Parliament to another, *nor before the hour in which I am speaking, has such a position been ever hinted at by any historian, or asserted by any man living, in or out of Parliament.* Upon all these observations, I desire, however, to build but one conclusion, which I hope will not be thought immodest or assuming by the House. I do not desire to make them a foundation for negating the resolution, but only offer them to show that the subject is as doubtful,

as it is momentous. I should be sorry to be driven to give my opinion upon it, before I have farther considered it; though if I be, I must follow the best light I have on the subject.—To obtain a few days for such deliberation, both for myself and for the House, is the single object of all I have said.—In conclusion, I would observe, that if the House fall in with my proposition, and the resolution is afterwards voted, it will carry with it all the additional weight which the interval of deliberation will have in public opinion; whereas if it is precipitately brought to a conclusion, though the first glare of the triumph of privilege may give it eclat and popularity, it will not carry the same weight, when the eye of history, in future times, comes to be turned upon our Journals.—He then moved, “That Sir Peter Burrell leave the chair, report progress, &c.”

December 23.—The question being loudly called for, MR. ERSKINE rose to reply. He said,

I am not surprised at the disposition of the House to terminate a debate of such unusual continuance; and nothing but my being the author of it, would induce me to ask the indulgence of the House for a moment. I am too much accustomed to take the measure of men's minds from their deportment during debate, not to discover that my motion will have the support but of a very few within the House. I will not, however, relinquish it, but bring the question to a decision. I am happy in being supported by the almost universal voice of a profession, which I am

sorry that it has been so much the fashion to cry down. I cannot but complain of the manner in which Mr. Burke, in particular, has treated their arguments, particularly my own. I feel, however, no disposition to retaliate; I recollect the superior age, and the various extraordinary qualifications and genius of the Right Hon. Gentleman, though he seems to have forgotten that I have been of the number of those who thought themselves entitled to his friendship and regard. The gentlemen of the law have been considered by him as no genuine members of the House, but as only perched there as birds of passage in their way to another. I can only say for myself, that if I had meant only to rest in this place, in the course of such a pursuit, I should hardly have lighted on the naked bough which supports me, but have sought the luxuriant and inviting foliage which overspreads the opposite side of the House, which would have afforded me kind shelter, and have accelerated my flight.

February 14, 1791.—On Mr. Burke's motion for limiting the Impeachment of Warren Hastings, Mr. ERSKINE said,

I only rise to prevent any misunderstanding of the principles which induced me to take the lead in opposing the former resolution concerning the impeachment. Although I sincerely commiserate the condition of Mr. Hastings, as unparalleled in the annals even of Parliamentary justice, yet the part I have acted, is neither built upon compassion, nor upon

any investigation of the merits of his case: the principle of my former opposition to the resolution which the House voted was, my opinion, as a lawyer, that the impeachment, whether well or ill founded, was, by the course of Parliament (which to that point was the law of the land), abated or discontinued: I delivered it as my conscience dictated, and according to the best lights I then had upon the subject. I have since taken pains to improve them, and am only more and more confirmed that my first opinion was well founded. The situation of things is now, however, greatly altered. The House is committed to an opinion on the subject, and it is absurd to suppose, that the large majority which has so recently voted the resolution, can possibly depart from following up its consequences to-night. The House has voted that the prosecution is still pending; it has declared, that with respect to the state of an impeachment, a dissolution differs in nothing from a prorogation, nor a prorogation from an adjournment, nor an adjournment of six months from one of a day: we are, therefore (at least according to the resolution of the House), exactly in the same situation, as if we had come out of the House of Lords yesterday; all the resolutions even of the former House remain valid acts; and the prosecution being thus voted to remain untouched by the dissolution, it follows, that they who would now stop its course, must take upon them the burthen of showing why it should not farther proceed. I cannot, therefore, agree that the agitation of the question of discretion should come from the managers:

on the footing of the resolution, which is now binding on even those who opposed it, it lies with those who seek to discontinue it. On the rumour, therefore, of a motion for its discontinuance, I came down, ready to listen to any grounds that could be laid before me to justify such a judgment; but no such materials have been produced. Undoubtedly, the House, notwithstanding the dissolution, may discontinue or abandon its prosecution, on principles of private justice, or of public policy, or of both mixed together; and as the law is not found strong enough to stop it, I, for one, should be most happy to attain the effect of it, by any mode consistently with my duty. But in the present state of things, reasons for abandoning the prosecution must be clearly made out within one of these principles, by those who propose the discontinuance. For this purpose, it will not be enough to show a probable case of innocence in the accused; we are bound to think him so till convicted; the prosecution only proceeds on probable cause of guilt; and therefore, if the honourable and unfortunate gentleman should be acquitted, I should not, as has been thrown out, agree in thinking that it would be any triumph over the Commons of England; but on the contrary, they would be bound to be parties to the acquittal, and to rejoice in the event. To stop the proceeding, on the principle of private justice, if its continuance be legal, which it has been voted to be, the articles must be shown either to have originally contained no criminal matter; or if containing criminal matters, that the Courts below have a competent,

adequate, and safe jurisdiction over them ; or that the articles were voted without proof ; or that, taking the proceeding to have been well instituted, it has appeared since, from defect of evidence, to have been founded in mistake. All these are grounds of discontinuance ; but no materials of these kinds are before me for my judgment, and the presumption, till rebutted, is in favour of regularity in all these things.—The next principle, which applies more to the debate, is the public policy of discontinuing it. But here, too, I want the data to form a correct judgment. In the first place, the principle of Lord Cornwallis's conduct, and the necessity of it ; his consequent justification and merit, which is to apply to the case of this impeachment, are points to which I cannot hastily, and on the materials before me, make up or bind my judgment : I neither know the facts of Lord Cornwallis's conduct, nor will I pledge myself to approve it, before there is a necessity, and before I have examined all that belongs to so large and important a subject. But a much greater difficulty is behind ; for, supposing I were convinced of all that has been alleged respecting that noble person, I want materials equally to make the application. Not having before me either the articles or the evidence against Mr. Hastings, the acts he is charged with, or the circumstances under which he acted, how can I determine that the cases are parallel ? And if they are not parallel, the proceeding in the one involves no question of private justice or public policy which bears at all upon the other.—These are the reasons why I cannot

give my vote to stop a prosecution, which, by the resolution of this House, nothing has interrupted, and which remains, therefore, to be proceeded on; as, of course, unless they who move to discontinue it, can show that it never should have begun, or having begun, should, from intervenient facts, be abandoned; on the other hand, bound as I am by the resolution which gives this turn to the debate, I must not forget that I have declared the continuance to be contrary to law; and retaining most clearly that opinion, from which I never will depart, it will, in my judgment, be inconsistent to vote for the continuance. I will, therefore, without meaning any disrespect to the House, decline taking any share in the decision of this question, or any other upon the subject, till I see, by the judgment of the House of Lords, that the prosecution still has an existence. When that point is decided, it will be time enough to arrange the forms, and to consider the justice of proceeding: till that decision is pronounced, I shall consider the resolutions as premature, or at least unnecessary.

DEBATE IN THE COMMONS

ON

MR. FOX'S LIBEL BILL.*

May 20, 1791.

MR. ERSKINE said, In rising to second Mr. Fox's motion, I declare that I cannot sufficiently express the

* "The declaratory statute, 32 Geo. 3, c. 60. (says Mr. Howell, State Trials, Vol. VIII. p. 36), has fully established the right of juries in criminal prosecutions for libels, to give 'a general verdict of guilty or not guilty, upon the whole matter put in issue upon the indictment or information.' This statute originated in the House of Commons, where the motion for the bill was made by Mr. Fox, and seconded by Mr. Erskine. Most undoubtedly the success of the bill is in a very high degree to be attributed to the inflexible constancy and unremitted zeal, with which the latter of these two great men had exerted the vast powers of his eloquence in maintenance of those rights of juries, which the statute asserts. Notwithstanding it had been declared by magistrates of the greatest learning, that the establishment of such a system would produce infinite confusion and disorder; nevertheless, so it is, that since the indisputable establishment of this system, no confusion whatever has occurred, the functions of judges and juries have been executed within their respective limits; without any competition for jurisdiction; to the advancement of justice, and to the dignity of its administration. The change which has been operated by the statute cannot be more perspicuously stated, nor can its beneficial effects be more happily illustrated, than in the note on the subject in the Trial of the Dean of St. Asaph."—*See vol. I. p. 328.*

gratitude which, as one of the public, I feel to my Right Hon. Friend for this last instance amongst so many others of his enlightened zeal for the support of the laws and constitution, upon their true principles, and of the warm interest he has constantly taken in the freedom and happiness of the people. Little or nothing is left for me to say; first, because the admirable speech you have just heard, embraces every thing which belongs to the subject; and secondly, because in the recent proceedings in the Courts below, which have happily brought on that fulness of time, so necessary for the success of every thing, I have over and over again (the trials, I believe, are in the hands of every body), maintained and illustrated all the principles of the measure before you, so that in now attempting to speak again upon the same subject, it appears to me like a tale that has been told. The subject, besides, lies in the narrowest compass. The law of libel as at present, and for a long time administered, is repugnant to the sound principle and inconsistent with the ancient practice of English criminal justice. It destroys the liberty of the press, whilst, as I am prepared from experience to prove, it dangerously promotes its licentiousness.—By annihilating the constitutional privilege of juries in a branch of their functions so general and so momentous, it brings the whole of their jurisdiction into dangerous question, and a remedy by Parliament is indispensable, because the evil in its present state is otherwise incurable.

I can assure the House, that in nothing I have to say, have I any idea of conveying blame or censure

upon the conduct of the present judges. So far from it, that as things now stand, from a succession of precedents, though in direct opposition to the most acknowledged principles and practice of ancient times, I should now find it difficult, if I were called upon to fill a judicial situation, to bear up against the current of decision, though they had obviously broken out of the original and prescribed channel of the law. Libels are divisible into two classes: viz. those which are the subjects of civil action, and proceeded against as such; and those which are prosecuted by indictment. The rule with regard to the first is fixed and undisputed, and as ancient as the law itself. A good name is more valuable than property, and reputation has always been asserted upon principles which have never been prevented nor brought into question.—In these cases, as in all questions of property, the judges are the undoubted depositaries of the law. The juries are to try the fact of publication, and the meaning or just interpretation of the matter published; but when both are ascertained, the defendant, if he has submitted his defence or justification to the court, is to be judged by the court, and without such plea can have no defence at all before the jury, if the publication be proved at the trial. In these cases the judges have not only an unquestionable, but a safe jurisdiction, because not only the law in such cases may be brought to a clear and positive standard, but political craft and oppression can neither have an interest in perverting justice, nor any possible means of doing it.

But indictments for libels, above all for those which

are prosecuted as being censures upon public men and the acts of government, stand upon an entirely different foundation ; and the root of the evil which now so loudly calls for a remedy is, that political judges have in these instances, from time to time, confounded criminal proceedings with civil actions ; and by abridging the jurisdiction of juries in cases of crimes (above all of this description), by referring to the rule in civil actions (where it was no abridgment at all,) the judges have usurped the unquestionable and immemorial privilege of the jury to decide upon every indictment for any offence whatsoever on the general issue pleaded, whether the defendant is guilty or not guilty ; the guilt in many, or rather in most instances, depending upon intention, which in the nature of things, it is perfectly absurd to consider as a question of law.—It is this departure from ancient authorities and practice which has brought into hazard, or rather has overthrown the most invaluable part of the British constitution.

I consider the jury as the Commons House of the judicial system—the balance for the people against prerogatives which it is necessary to trust with the Crown and its magistrates, but which will often, when unbalanced, degenerate into oppression. The monarchy of Great Britain would not deserve the name of a free government, nor have been suffered since the Revolution to exist for a moment, without parliamentary and judicial balances, which, whilst they leave and even secure to the Crown all the vigour of the most absolute governments, far better secure the freedom and

happiness of the people, than the most unbridled democracies in any age have ever been able to accomplish ; and I venture boldly to assert, that the privileges of this House are not more essential to resist the power of the Crown than the privileges of grand and petty juries in our judicial system ; since, were it not for their daily and hourly protection, the dominion of fixed magistracies would, ages ago, have crumbled into dust the liberties of the people.

As this is a proposition which no man in England will be hardy enough to dispute, what will the House say when it is a matter absolutely demonstrable, that the trial by jury in every case which now affects the most essential liberties of the press, has no longer any useful existence ; because the judges now apply the law of civil actions to criminal trials, though nothing can be more distinct or different. In the former, the law has been immemorially pleaded to the judges, and can not come before the jury ; in the latter, it has always, from the most ancient times, been left to the jury by the general plea of not guilty. In the first the accusation proceeds from the court ; in the second, it originates with the grand jury. In the first, the acquitting verdict of the jury may be set aside, if contrary to the opinion of the judges ; in the second, it is final ; and whilst attaints exist, the jury can never be attainted. To suffer, therefore, such diametrically opposite jurisdictions to be confounded, and such invaluable privileges to be trampled upon, would be to throw away the armour of the constitution provided by the wisdom of our fathers against powers dangerous to

withdraw from the Crown, but more dangerous to exist without the counterpoise of the trial by the country.

As the law stands at present, if a writing be charged even as an overt act of high treason, the Court may convict the prisoner upon the mere proof of publication, withdrawing from the consideration of the jury the traitorous intention which, in the language of the statute, is the very essence of the crime; because, according to the course now uniformly taken, the judge tells the jury, in all prosecutions for criminal writings, that they have only to find the publication, and the innuendoes or alleged grammatical interpretation of the paper, and upon that to find the defendant guilty; adding, that if the Court shall afterwards consider the writing so interpreted not to be criminal, the judgment will be arrested or reversed upon writ of error. But to expose such doctrine to shame and reprobation, it is only necessary to inform, or rather to remind the House, that if upon such motion the judgment should be arrested, the innocence of the defendant's intention is argued before the Court, the answer will be and is given uniformly, that the verdict of guilty has concluded the criminality of the intention, though the consideration of that question may have been by the judge's authority wholly withdrawn from the jury at the trial. It certainly is now too late to rectify this monstrous and iniquitous absurdity, except by the authority of parliament: though the judges who first introduced those doctrines ought to have been impeached and degraded. Indeed, the mischievous

origin of the system is notorious. Upon the revival of letters, government soon felt the influence of printing upon public opinion, when it was directed against their abuses ; and with us the Star Chamber was set on foot to repress it ; but the firmness of our ancestors, and the vigour and freedom of our institutions soon overthrowing that odious jurisdiction, nothing was then left but to pervert the ancient constitution of juries, and notwithstanding the triumphant result of the trial of the Seven Bishops, when their privileges were fully recognised and acted upon, a constant assault was kept up by subsequent judges against their jurisdiction, and carried to such an extravagant pitch, that on the trial of Penn and Mead for seditious preaching in Gracechurch-street, an attempt was made to imprison a jurymen for refusing to receive from the Court what was falsely and wickedly called the law, though a plain fact for the jury's consideration, an outrage which was exposed and beat down for ever by the immortal exposition of the Lord Chief Justice Vaughan, who, upon a Habeas Corpus, discharged the intrepid prisoner, a second Hampden, for the example and admiration of posterity.

But, notwithstanding all these cases, Lord Chief Justice Raymond, on the trial of the Craftsman, thought fit to tell a jury, that the doctrine of its being the judge's duty to leave the whole case to the jury, was a notion which had then been taken up of late by some persons who ought to have known better, and this most rash and unfounded declaration has been echoed from judge to judge down to the late trial of

the Dean of St. Asaph, though to the honour of the Bar be it spoken, the counsel (Mr. Bearcroft) in that case, with a brief in his hand for the Crown, would not surrender the privileges of the people ; but what was conceded to the defendant by the adverse advocate, was not granted to him by the Court ; the doctrine now complained of having been confirmed by the whole Court of King's Bench, when presided in by Lord Mansfield, whom I can never name without affection and respect ; and so barren was the usurpation in legal authority, that a ballad found itself in the mouth of that great man which was sent to Sir Philip Yorke, after the acquittal of the Craftsman, in which the author was supposed to have admitted the doctrine contended for, by writing that,

Sir Philip's innuendoes

Would serve him no longer in verse or in prose,

As twelve honest men had decided the cause,

Who were judges of fact, though not judges of laws.

Whereas on reference to this poetical record, it was found to be just the contrary ; viz.

“ That twelve honest men had decided the cause,

“ Who were judges alike of the fact and the laws.”

I can state from my own long experience what has been the effect of this system. Have juries been prevented from improper acquittals ? Has the Crown been secured by it in the preservation of order and obedience to the laws ? Just the reverse. Every man, be his acts wicked or charitable, has been looked upon

and pitied as the victim of a pernicious usurpation ; and juries, whilst they may secretly condemn the criminal, refuse, in many instances, to pronounce verdicts of guilty, when the investigation of guilt has been withheld from them. So that a counsel's best defence of any kind of libel is, to expose the doctrine, and keep the libel out of sight. I can appeal to the whole Bar for the truth of this observation.

I shall mention but one case more of the oppression inseparable from the system complained of. An insinuation had appeared in a public paper, that the Russian ambassador was a spy, which was very properly made the subject of a prosecution, but the defendant, who was the proprietor of the paper, was set upon the pillory, though he produced an affidavit of a physician of the highest reputation, that he had been delirious in a fever at the date of the publication, and even that fact was held to be no defence upon the trial. It is surely impossible to figure to the human imagination any thing more disgusting or horrible.

I wish for the sake of unanimity, that my Right Hon. Friend would for the present put aside the other matter which he has introduced for consideration. I think that nothing should be mixed with the grand and paramount question which may interrupt the harmony of the decision. There is no doubt of the inquisitorial power of the House over the judges, but it is a power which ought to be most sparingly and cautiously-exercised. It ought to be kept in the recesses of your authority, to be produced only in cases

of the utmost emergency.—It is not desirable even to speak lightly or harshly in this House of the conduct of judges, as it tends to disturb that confidence in the administration of justice which is of such infinite importance to the public security and happiness.—There is no doubt that in different cases of *quo warrantos*, (which Mr. Erskine here stated,) Lord Mansfield and the other judges have laid down the doctrine of a year's limitation, and in two years afterwards directly the reverse,—an evident proof how much they are embarrassed by the uncertainty of matters which from their very nature were not subjects of judicial discretion. The abridgment of such jurisdiction would be easier for the judges and safer for the people.

May 25.—On Mr. Fox presenting the Bill, Mr. ERSKINE said,

Sooner than consent to give up the preamble of the Bill, I will abandon the Bill for the present altogether, and leave it to the people of England to protect their rights themselves by their verdicts when on juries, until a more favourable moment may arise when Parliament will be prepared to recognize, as a clear unquestionable principle of law, that their rights in cases of libel are the same as in all other criminal trials, in none of which their privilege to pronounce a general verdict has ever been disputed. I desire it may not be understood, that because I am a determined friend to the preamble, it is my object to confound the functions of the judge and of the jury.—Far from it—

wherever the law has separated them, I wish them to continue separate—whenever any special matter is legally pleaded, the judge, not the jury, is undoubtedly to decide, but when the general issue is joined, the law and the fact are then inseparably blended, and the jury have a legal and constitutional right and duty to decide upon both, by giving a general verdict. This never has been questioned in any criminal case, that of libel only excepted; but neither in principle nor in ancient practice, is there any foundation for the exception.—Something I said on a former day has been referred to by my Hon. and Learned Friend, to prove that the practice of the Courts, for near a century past, has not been erroneous, because I said that were I now placed in a judicial situation, I should feel myself bound to abide by the decisions of my predecessors. I do not mean to retract a syllable of that declaration; I have always been of opinion, that when a practice has long obtained, however erroneous in its beginning, it is better it should be corrected by the legislature than by the authority of any Court; because if a series of precedents may, upon the opinion of new judges, be rescinded, there can be neither uniformity nor safety in judicial proceedings; and a fatal uncertainty will disturb the whole system of the law. A stand ought to have been made at first against so dangerous an innovation.—These are the grounds on which I have built, and on which I now abide by my declaration on a former day; and I cannot help expressing my surprise that any objection should be now made to a Bill which has been brought in with unanimous con-

currence. It is a want of respect in gentlemen for the House itself, to rise up against its second reading, since by giving to my Right Hon. Friend its unanimous consent to introduce it, an opinion in its support may be said to have been unanimously given, which what has been said this day cannot be thought sufficient to shake.

May 31.—The House being in Committee on the Bill, Mr. ERSKINE defended the Preamble of the Bill, and said,

The only argument that can, I think, be adduced for expunging it is, that it is a truism, and perhaps unnecessary. In criminal law, where a general issue is joined betwixt the King and a defendant, the jury have a jurisdiction over the whole matter. The Learned Gentleman well knows that by these words the jury are not empowered to judge of the law. How can the judge decide on the law till the jury have decided on the fact? for, previous to that, he cannot tell how far the law will bear upon the fact. The clause proposed by the Learned Gentleman, is of much more dangerous consequence than may at first be apprehended, as it goes to narrow the jurisdiction of the jury in all criminal cases; for if these words are adopted, it will look like a kind of declaratory act. It ought not to be adopted, because the consequence that would be produced by it would be of the most dangerous kind. The amendment tends to weaken the power of the English jury, and thereby endangers the constitution. Instead of

entitling the Bill, "A Bill for ascertaining the law of libels," it should be called, if the amendment were agreed to, "A Bill for curtailing the power of juries;" because, if juries are to give a verdict according to the direction of the judge in cases of libels, they may be tempted to pay implicit obedience to his advice, even in cases of a much more criminal nature. Should, however, even this consequence not ensue, still the amendment is improper; for in future times of oppression, a judge, who may be the tool of the Court, will possess the power of controlling the judgment of the jury, to the manifest injury of the liberties of the people.—I will state the powers of a jury in criminal cases; if they even pronounce an innocent person guilty, in case of murder, felony, &c. in the teeth of law and evidence, the judge must pronounce sentence of death in the first place, and the remedy only lies in the King, who can pardon the guilty as well as the innocent, under such a verdict. And again, if a jury, in despite of law and evidence, acquit a felon, he is immediately discharged; such is the wisdom of the constitution in the interposition and augmentation of the powers of a jury, lest the Crown should bear too hard upon the life of a subject; nor can a jury be amerced or imprisoned for their verdict since the days of Bushell,* who was moved by Habeas Corpus to the Court of King's Bench, and acquitted by his peers, before Mr. Justice Vaughan. What was the case of the Seven Bishops? Two of

* See Howell's State Trials, Vol. VI. p. 999.

the judges made no difficulty in declaring, that the petition which they presented was a libel; but the jury acquitted them. Such is the excellence of our constitution, which provides a check against the influence of bad judges, in bad times! (Mr. Erskine read a passage out of Bracton, to show, that the juries, in the opinion of that old writer, were judges of law and fact: for then it was stated, that no man is to be tried in life or limb, but by the Curia and Pares, and that the King is not to interfere, because that would make him at once accuser and judge, nor the judge, because he is the representative of the King.) I certainly wish that the practice should be continued, that the judge should give his advice and direction in matters of law; but I do not wish, that an act should be passed for that purpose. In sea cases, where one vessel runs down another, what is the practice of the noble and learned chief of the King's Bench? Why, that exalted personage sends for some of the elder brothers of the Trinity-house to take their opinion. Is this any reason that he is obliged to adopt their opinion? In order still further to strengthen these arguments, I would draw a distinction betwixt civil and criminal cases. In the former, what is the practice? Why, the plaintiff enters his complaint on the records of the Court: process is issued to compel the appearance of the defendant; if it is matter of law, it is left to the decision of the judges; if matter of fact, it is left to the jury. The jurisdiction of the jury extends to the whole matter at issue.

DEBATE ON MR. GREY'S MOTION

RELATIVE TO

PARLIAMENTARY REFORM.

APRIL 30, 1792.

MR. ERSKINE said, I do not rise to answer the arguments or declamation I have this night heard, but merely to give my reasons for suffering my name to be printed with the Resolutions of the Association alluded to, (“The Friends of the People.”) If I have fallen into an error in this respect, I have the consolation of knowing, that I was not the beginner of that error. The Right Hon. Gentleman himself, who, for talents and descent, as well as official situation, ranks amongst the first in the kingdom, is before me in it. That Right Hon. Gentleman cannot forget that he once, and that his venerable father had always, entertained the same sentiments respecting the necessity of a parliamentary reform, which the Association now professes.—Next, as to the mode and time of attempting a reform, I rejoice that I have an opportunity of making my own defence in person, and of stating what I have done, why I have done it, and the time in which I have done it; and I do assure the House, the

moment that my opinions are refuted, and my understanding convinced, I shall be ready to acknowledge my error, and to retract it. After being thought worthy to be trusted with the affairs of other men—after having lived in various situations and different countries, I cannot be induced to think myself so egregiously weak, as the Hon. and eloquent Gentleman who spoke last would represent all the members of this Association. They are represented as sounding the trumpet of alarm, for the purpose of changing the constitution; but had such been their intention, I, as a lawyer, acquainted with the prosperity of our forefathers under the present constitution, and tasting myself of that prosperity as an individual, should not have lent to it the aid of my name.—By the very preamble of their Declaration, it appears that the Association looks to the constitution as their principle, and the vitality of their proceedings. (Mr. Erskine read the printed Declaration of the Association.) I appeal to the House, whether the words, “making the preservation of the constitution, on its true principles, the foundation of all their proceedings,” do not expressly limit them within a boundary, that precludes the possibility of their attempting any thing dangerous? Can they, I ask, consistently with this Declaration, infringe the royal prerogative, or in any way meddle with the King’s majesty, or with the Lords? So far from injuring the constitution of this country, I would sooner turn back to the profession I have left, and fight and perish for it. In reply to any apprehensions of other danger, I shall only quote the opinion of Dr.

Johnson, and say, that "to suggest an idea of our constitution being overthrown by a rabble, is to suppose that a city may be destroyed by the inundation of its own kennels!"—I do not mean to enter into a historical disquisition on the subject, or remind the House that the present mode of election originally took place by accident; but will the Right Hon. Gentleman (Mr. Pitt) propose as a resolution, that the representation of the people is adequate to every purpose of sound policy, and to the supposition of the constitution, and so condemn the notice which is given in parliamentary form? If not, what has happened since he brought forward his motion for a reform, to make such a measure less expedient, or less necessary now than it was then? Grant that the country is in a more prosperous situation, yet it has no security against a relapse, but in the wisdom of the Right Hon. Gentleman. But I am happy that the Chancellor of the Exchequer stands in the same situation with myself, and has at least equally incurred the censure of the very eloquent Gentleman (Mr. Burke), since he was amongst the first to excite the spirit of change, and has laid the foundation of that to which I and my friends are only about to add a brick.—It is the intention of the constitution, that the House of Commons shall be a representation of the people. If I were to say what I think as to the fact of its being so, there might be reason for interrupting me. I shall say, however, that it is not a representation as it ought to be; and in recommending such a reform, as would make it what the constitution meant it to be, I do not

conceive that I can be charged with a wish to subvert the settlement, and propagate confusion and disorder.— I have spent a melancholy day in the Court of King's Bench—melancholy, because I have this day heard a gentleman (Mr. Horne Tooke) say to a jury, in his own defence, that the rotten boroughs are looked upon in the House of Commons as its vital essence: that acts of Parliament have been passed on their account, to take away the trial by jury; and that these acts are too infamous, and made by people too infamous, to be attended to by a jury of the country. Such an expression no man would dare to venture upon, unless defects exist; and therefore the House ought not to suffer these defects to remain unremedied.—The Russian armament is an instance in which the sense of the House and the people were diametrically opposite. The Parliament was all confidence, the people all murmur; and the House was proceeding, without hesitation, in every vote which the minister required, till called to order by the interference of the people. This never ought to happen, nor could it happen, if the people were adequately represented. If the facts on which the Association has been founded, are either false or exaggerated, then their efforts will be still-born and abortive. But if, on the contrary, their union is formed on a right principle, and if it shall also appear, that there are persons in the country who are determined to achieve every possible mischief to the constitution, then the Association may take their motto from Mr. Burke, who has said, in one of his works, that “when bad men conspired, it became necessary

“for good men to associate.” In this view of the question I may add, from the same authority, “that temperate reforms are wise in proportion as they are moderate, and that great reforms are bad as they are desperate. The latter ever resemble the conduct of a mob before a brothel, who abate the nuisance by pulling down the house.” The reform which my Hon. Friend means to propose, will be conformable to these maxims ; and not being to be discussed till next session, that it is not now stated, is no more an objection to it, than it would be to the recipe of a physician, that it had not been written six months before the prescription was to be taken.—If the House does not afford relief, every man will be driven back to his individual capacity ; and when the people begin to act for themselves, it is to be feared, that their demand may not be so reasonable as at present. It has been said that the manner of bringing forward the subject is wrong, because there has been an application to the people, This application arises from the necessity of the case. In pleading the cause to the House, it is pleading it to the interested party. It is literally addressing argument to the deaf adder. I do not mean personal enmity to any Right Hon. Gentleman, and I believe that I have as few enemies as any man ; but will Gentlemen consent to give up the privileges which they consider as their birthright ? they who are proprietors of boroughs, will they give them up ? It is as if, in the course of my profession, I should attempt to plead for an ejectment to a jury, who were tenants in common of the estate which I claimed. I am a

friend, in some degree, to what a Right Hon. Gentleman called a natural aristocracy ; but, during this administration, so many peers have been made, not for any of those merits which properly claim the honour, but for possessing parliamentary influence, that this part of the constitution will be ruined by its own corruption. All those persons who are promoted to the peerage, leave their delegates in this House. In fact, Parliament is so constituted, that the Right Hon. Gentleman, independent of his situation, as the first political servant of the Crown, cannot, by the finest speech he ever made, and with the justest cause which he can choose, convert one single vote. The measures of the Association so much alluded to, are the most likely to preserve the peace of the country ; and therefore I have subscribed to them. If their tendency were otherwise, I must be the worst of lunatics, my situation being considered, my unparalleled success, my prosperity so wonderful when my origin is viewed, my present possession of every thing to make a man happy, and my prospects, which there is nothing to interrupt. Why should I then waste my own constitution, when I am endeavouring to preserve that of the country, and when I might be in peace with my family, if my attempts were to endanger that prosperity which is so dear to me ?

DEBATE ON MR. FOX'S MOTION

FOR

SENDING A MINISTER TO PARIS.

DECEMBER 15, 1792.

MR. ERSKINE.

I HAVE been so much accustomed in another place to hear the interests of mankind conducted upon the principles of reason instead of being betrayed by passion, that declamation, however eloquent, makes no kind of impression upon me. I think we have nothing to do with the new constitution of France, nor ought to mix her distracted revolution with the settled condition of our own country, which I may take full credit to myself for wishing to support. The same anxious wish is the obvious object of my enlightened and Honourable Friend: yet no sooner is the motion made, than a Noble Lord starts up, and in a storm of the most extravagant description, reprobates both the motion and the motive from which he charges it to have proceeded. If the Noble Lord is really ashamed (as he was pleased to say) of the enthusiasm he formerly felt for my Right Hon. Friend (Mr. Fox),

whose principles he has so often recommended to others, and acted upon himself; ought he not to be still more ashamed of the enthusiasm of to-day, which has taken so new, so extraordinary, and so unfounded a direction?—If my Right Hon. Friend were an enemy to his country, all the world ought to desert him; but after the many proofs of his warm zeal to support it, so often testified by the Noble Lord himself, what colour is there for so sudden, so unprovoked, and so violent an attack. On the first day of the session we were not only not considered to be at war with France, but a strong disposition was expressed to avert hostilities. What then is the objection now to what my Right Hon. Friend has proposed? When he advises the sending an ambassador, does he advise to put into his mouth anything degrading to the country, or injurious to its interests? No. He only desires that we should have a person on the spot, clothed with a public character to give facility to a treaty, if a suitable opening should present itself; just, in short, as we should proceed, and always have proceeded, with every other power. But it is said, that it would be nugatory for the House, in the present state of things, to advise the King to send an ambassador, without also advising the instructions to be given him. I confess I think otherwise, and that the embassy proposed should, like any other, be under His Majesty's direction.

But France is, it seems, in a situation too disturbed to justify an embassy. That is, however, only to say in other words, that, because France is internally

disturbed, we are resolved, on that account, to go to war with her, whatever may be her disposition for peace ; for war is the certain consequence of putting under this new and unheard-of proscription. If war, indeed, were inevitable, we ought to meet it boldly ; but if we have a justifiable choice to avoid it, we surely should consider before we resolve to wage it, since how, after it is once begun, is it ever to be ended ? Are we resolved never to be at peace again with France until she has formed a government which falls in with our opinions of moderation and justice, or until she has formed one upon the model of our own ? Until one of these things take place, which are so little likely to happen, are we to be plunged into all the horrors which ever attend the most prosperous hostilities, most especially in the condition of our country, so much exhausted by the ruinous contest with our own colonies ; and all this upon the ridiculous punctilio of sending an ambassador, which makes the evil quite incurable, because, whilst it involves us in a war, it may equally prevent its termination.

But we are afraid, it seems, of the contagion of French principles. Is that a reason against sending an ambassador ? Are we afraid that, on his return from an unsuccessful embassy, he may bring over the infection ? The plague of the mind is not like that of the body ; it cannot be imported in a bag of wool. Did we ever before refuse to send ambassadors because countries were wickedly or absurdly governed ? Did we refuse to send one to Morocco, and declare war against her, on account of her despotism or superstition.

I am as much an enemy as any man to violent and intemperate strictures upon any supposed defects in our government or constitution, yet I can never feel any alarm when they occur, as they ever must, in a free country. I trust to the good sense of the people, and to the substantial interest they have in our long-tried and inestimable establishment. I revere and love it myself, and with as much reason as most men in the country, of which I only remind the House, as every man is now suspected of disaffection, and is obliged to pronounce publicly his political creed. It has been said that there never was nor can be an occasion nor a period more favourable for a war with France; but I maintain that there never was nor can be a moment favourable for war with any country in the world, when peace can be honourably and safely preserved. It is the scourge of the human race, and every statesman ought to bear in constant memory Dr. Johnson's admirable and striking picture of its calamities. I read it long ago, and never shall forget it.

In his "Falkland Islands" Dr. Johnson says, "It is amazing with what indifference the greater part of mankind see war commenced. They who have only read of it in books, or heard of it at a distance, but have never presented its evils to their minds, consider it as little more than a splendid game; a proclamation, an army, a battle, and a triumph. Some indeed must perish in the most successful field, but they fall upon the bed of honour, resign their lives amidst the joys of conquest, and filled with England's

“glory, smile in death.” Such, I am confident, will be the death of every Briton, who, if we are forced into a war, shall fall in battle for the honour, the safety, the constitution and the freedom of his country ; but let us see the other side of the picture. The life of a modern soldier is ill represented by heroic fiction. War has means of destruction more formidable than the cannon and the sword. Of the thousands and ten thousands that perished in our late contests with France and Spain, a very small part ever felt the stroke of an enemy ; the rest languished in tents and ships, amidst damps and putrefaction ; pale, torpid, spiritless, and helpless ; gasping and groaning, unpitied among men, made obdurate by long continuance of hopeless misery ; and were at last whelmed into pits, or heaved into the ocean, without notice, without remembrance. Thus, by incommodious encampments, and unwholesome stations, where courage is useless, and enterprise impracticable, fleets are silently dispeopled, and armies sluggishly melted away. Such are the inevitable evils to which we expose the best and bravest of our fellow-subjects by war ; and what are the advantages we reap from it, even when the termination is most prosperous ? and who are they that reap the profit ?—They only who are ready on all occasions to raise the voice of acclamation when war is proposed.—Hear again Dr. Johnson. “ Thus “ is a people gradually exhausted, for the most part, “ with little effect. The wars of civilized nations make “ very slow changes in the system of empire. The “ public perceives scarcely any alteration but an

“increase of debt; and the few individuals who are
“benefitted, are not supposed to have the clearest right
“to their advantages. If he that shared the danger
“enjoyed the profit, and after bleeding in the battle,
“grew rich by the victory, he might show his gains
“without envy. But at the conclusion of a ten-years’
“war, how are we recompensed for the death of mul-
“titudes, and the expense of millions, but by contem-
“plating the sudden glories of paymasters and agents,
“contractors and commissaries, whose equipages shine
“like meteors, and whose palaces rise like exhalations?
“These are the men who, without virtue, labour, or
“hazard, are growing rich as their country is im-
“poverished; they rejoice when obstinacy or am-
“bition adds another year to slaughter, and devastation;
• “and laugh from their desks at bravery and science,
“while they are adding figure to figure, and cypher
“to cypher, hoping for a new contract from a new
“armament, and computing the profits of a siege or a
“tempest.”

These are the men (I know they are), who dwell in palaces rather than common habitations, who revel in luxury and riot; who without virtue, industry, or courage, derive a splendid revenue from the ruin of their country; who look upon every new contract as an estate, for which they would sacrifice one half of their species; and when the toils of battle are over, proudly despise the very men by whose labour they became rich. I will not consent to the ruin of my country by war, to oblige such characters. I say, you should deliberate again and again, before you com-

mence it. I will not attack the Chancellor of the Exchequer, who is not yet returned to this House,* but he has asserted in the King's Speech, and the House has agreed to the truth of it, in their address, that the surplus, as it is called, will be sufficient to carry on the war without a fresh imposition of taxes—Do you really mean to say that such a miserable pittance is sufficient to carry on war, and that, too, at a time when we are hardly able to make the revenue meet the various claims upon it? What sort of a war is it to be that is thus to be supported, and against a people too who are described (but I do not join in the description) as having become savage beyond all example, who have no sense of justice or humanity, and are aiming at universal dominion?

But it seems that my Right Hon. Friend (Mr. Fox) is a dangerous man to his country at the present moment from the opinions he holds; and a Right Hon. Gentleman (Mr. Burke) lets loose all the virulence of invective against him, because, after years of agreement and friendship, he now happens to differ from him. I am sorry to be called upon to observe this; because I never can forget the merits of the Right Hon. Gentleman, whose writings have shed a lustre upon our country and its language, and from which I myself have learned to love the principles I am now maintaining; but I wish it to be recollected,

* Mr. Pitt was not present during the important debates of the 13th, 14th, and 15th of December, having not yet been re-elected since his acceptance of the office of Lord Warden of the Cinque Ports, vacant by the death of the Earl of Guilford.

that at the time those very writings were published, the author and his opinions were treated with as much asperity in the House as the opinions now held by my Right Hon. Friend. These recollections ought to teach us to bear with one another, and not to be rash in imputing wicked opinions to all who differ with us in politics.

As to my Right Hon. Friend, who has been made the subject of these reflections, he needs no eulogium. All the world knows him to be a man born for great public purpose. With a mighty mind to comprehend, a commanding eloquence to illustrate, and a temper to give popularity and effect to the best interests of his country in the worst of times. He has said that he will stand in the gap to preserve the constitution ; and men now in the presence of the House, whose characters are as irreproachable as their talents are eminent, have declared that they will stand by him and with him in its support.

It is necessary for the country and for ourselves to hold this language of self-defence. It has become almost a custom to treat gentlemen rather as conspirators than as members of the House of Commons, if, when speaking of France, they do not pour out upon her the vials of their wrath ; and in the very same manner are they treated, if, when speaking of our own government, they do not launch out into the most hyperbolical admiration. They are, indeed, rather in the condition of criminals who have to answer for offences, than as the people's representatives delivering their opinions.

But to return to the question—the country has been said to be ready in many parts to fall into insurrection.—Another strange reason for war, since adding to the burthens of the people, can only add to popular discontent.—But the great question of all is—If war is to be made, how and when is it likely to be concluded?—because if no probable conclusion can be held out by those who vote for it, they vote for a war of which they see no profitable, nor, indeed, any termination.—Deeply impressed with these considerations, I give the motion which is calculated to avert it, my most cordial support.

DEBATE

ON THE

TRAITOROUS CORRESPONDENCE BILL.

March 15, 1793.

MR. ERSKINE.

WHEN the Learned Gentleman (the Solicitor-General) threw out some expressions concerning the soreness of some persons upon the present subject, I am persuaded he did not mean to insinuate, that there were any persons within the walls of the House less desirous than himself to maintain the tranquillity and prosperity of the country : if he had entertained any such suspicion, I am sure he would have been manly enough to say so. On the present occasion, I confess that the Attorney and Solicitor-General have greatly the advantage over me—they no doubt have examined every authority in any manner connected with that which they intend to propose ; whereas I have no information upon the subject of treason except that general knowledge which grows out of the study of the law, as from the practice of it I have learned nothing ; for such is the attachment of the people to the present sovereign, and such their reverence for

the constitution, that during the fifteen years I have been at the Bar, I have witnessed but one trial for high treason, and in that solitary instance the prisoner was acquitted.

I maintain that the Bill is directly repugnant to the policy of the best and wisest of our ancestors, and contrary to the highest authorities in the law. The Learned Gentleman who brought in the Bill professes to have taken Lord Hale for his guide. I wish every man present would look without delay into his Pleas of the Crown, and compare the Bill with its supposed model. No man was a greater enemy than Lord Hale to those temporary acts which Parliament itself has repeatedly declared to be dangerously destructive of the venerable statute of Edward III. In Edward IV.'s time (a circumstance which the Learned Gentleman has not found it convenient to refer to), all these obnoxious statutes were swept away, and in the reign of Queen Mary they were again swept away, with a preamble reprobating their pernicious and impolitic principle. Thus, as often as they sprang up like weeds in the wholesome harvest of the law, the legislature mowed them down and destroyed them. Why, then, are the fundamental principles of criminal justice, thus consecrated for ages, to be now shaken by an unnecessary and mischievous act of legislation? By the ancient statute of Edward III. no man can be guilty of high treason unless his mind be proved to be traitorous; whereas this Bill, the very foundation of which is unjust suspicion of the people, declares specific acts to be traitorous, without regard to the

intentions specified in the original act of King Edward, with a view, it seems, to guard men against falling into treasons. For my part, "*Timeo danaos et dona ferentes.*" The Attorney-General, by this Bill, gives a statutable exposition of treasons, which I deny to be a just one; and even if it were, Judges upon the new text may build up new constructions as they did upon former ones. The great value of the ancient law is simplicity and security. The mind alone can be traitorous; compassing and imagining the death of the King, levying war against him, and adhering to his enemies, are all acts of the mind, evidenced by the overt acts of their accomplishment; but under the present Bill, if it pass into a law, a man may be convicted of treason with as little ceremony as if it were for pulling down a turnpike gate, or for some petty offence against the excise or customs; the connection may be supported without due regard to mischievous purpose. New constructions, besides, as I have just said, may arise upon the Bill when it comes to be expounded in the Courts. Another Attorney-General may also come with some new Bill upon some assumed new necessity, and thus the liberty of the subject may be expounded away until it is lost and destroyed altogether. It is urged, that the circumstances of the times call for this extraordinary measure. I desire to know what are these circumstances, which can justify the lessening or endangering the freedom of the country. I know of nothing which has happened, except that a false alarm has been propagated for the purpose of strengthening the hands of government,

and weakening the liberties of the people : and by this artifice, ministers are to have unbounded confidence, and every body else is to be stigmatized by distrust, and libelled by suspicions of treason and rebellion. Now, where is the evidence to warrant all this, or any part of it. Has the Attorney-General a single indictment against any one person now depending ? Has he even any well-founded suspicion that treason anywhere exists ? Has he any informations on the file for sedition ? Not one of these ! Yet the country is defamed, by being described as in a state that requires the laws of treason to be amended. Were the government really in danger from disaffection, I should not have been found setting up improper forms or niceties of law to protect traitors ; and I believe that the whole body of the people would join heart and hand to beat down such mischiefs. If the country were false to itself, and were falling into dangerous disorder, there might then be some necessity for a legislative interference. Parliament is undoubtedly omnipotent, and in such a case would have a solemn duty besides to exert all its authority ; but it ought to manifest a sound discretion in the exercise of it. “ *Nec Deus intersit, &c.* ”—I proceed to remark on the other clauses of the Bill. It is surely rather absurd to prohibit persons from purchasing lands in France, in the present distracted state of that country, whilst this kingdom is in a condition so highly prosperous, and affords so many favourable opportunities for the employment of money. Instead of prohibiting persons to deal in the French funds, ministers should rather take care that a

calamitous war may not prevent them from purchasing in our own. The regulation to prevent persons from coming from France to this country without a licence, is also highly objectionable ; many of them are persons whose going abroad is unavoidable, some for the recovery of their health, others from the derangement of their affairs : with respect to such persons the regulation is oppressive, as it puts every thing in the power of ministers ; and it is impolitic, as it seems calculated to disgust at the moment when we should be most solicitous to render our own country a land of freedom and delight. On the subject of insurance, I remark, that from the high premiums demanded in war, the balance must be in favour of our insurers. I conclude with again adverting to the statute of Edward III., which I consider is all that is necessary, and as calculated to meet every occasion on which the crime of treason can fairly be alleged. The present Bill I therefore consider as both unnecessary and dangerous. Show me the necessity, and I will go hand in hand with you in any act that can be brought forward.

DEBATE ON MR SHERIDAN'S MOTION
FOR THE REPEAL OF
THE HABEAS CORPUS SUSPENSION ACT.

JANUARY 5, 1705.

MR. ERSKINE.

IN order to discuss with precision the expediency of repealing the act which the motion seeks to repeal, it is necessary to consider upon what principles, and under what circumstances it was passed in the former session ; because the question ultimately will be, whether a necessity for passing it ever existed ? and, if it did, whether it still continues to exist ? The act which the motion seeks to repeal is, an act introduced upon the spur of a necessity assumed to be imminent, to suspend the operation of a law which no minister that ever shall exist in England will dare to abrogate ; a law, without which England has no constitution ; a law which the people obtained by the virtue and firmness of their ancestors, after a great crisis in the government, and which they could not and would not submit to part with. To do justice to the minister (for I would misrepresent no man), this truth was fully admitted by him when the Suspension Bill was pre-

pared. The suspension of any law is admitted to be the highest act of authority, which the legislature of of this country never delegates to the highest magistrates even of the most insignificant law under which the subject lives and is protected; *a fortiori*, a law upon which the very being of public liberty depends.

—But it is said and truly said (for I admit the proposition, though I deny the application), that there are conjunctures in all states, in which laws made for universal protection must yield to a paramount necessity, and that, as Blackstone says, “the nation, in such case of imminent necessity, parts with its liberty for a short season to secure it for ever.”

The existence of this paramount necessity was therefore assumed by the minister in the last session; when, after having advised his Majesty to arrest the persons and to seize the papers of many of his subjects, he further advised him to send a message to this House on the subject, which was brought by the secretary of state on the 12th of May last. This message informed the House that his majesty had discovered the existence of a traitorous conspiracy to hold a convention which was to subvert the government, and assume to itself all the functions of Parliament. I have read the terms of the message, to show that the House did not suspend the Habeas Corpus act upon a vague undefined suspicion of a conjectural conspiracy, but upon what appeared to it to amount to sufficient evidence of a distinct, specific treasonable conspiracy against the government: not, as Mr. Windham stated it, a general suspicion of undefined danger from seditious libellers or disturbers

of the peace, but a positive accurately delineated, and defined conspiracy, to hold the convention, which was to suspend the functions of Parliament. His Majesty's message, and the papers it referred to, were, in consequence of it, referred to a secret committee; that secret committee, by its report published the evidence, and declared the existence of the same defined specific conspiracy: the Chancellor of the Exchequer then moved for the suspension of the Habeas Corpus, on the same specific ground; and the preamble of the act itself recited its existence.

The Habeas Corpus act, then stood suspended to the 1st of February, not as to a day that had any thing particular in it; not as an epoch in the country; but as to a period within which the House expected that what had happened would take place: viz. that the matter contained in the reports on *ex-parte* evidence, would be confirmed or negatived, and explained in the judicial proceedings set in motion by the House in consequence of its answer to the Crown. The Attorney-General's duty, therefore, under all these circumstances was, to set the criminal law in motion—to point it to the charges made by the House—judiciously to prepare the charge, to select the most proper criminals upon the evidence, and so to arrange that the grand jury, and afterwards the petty jury should have the full view of all that the two Houses had prepared. The indictment was therefore prepared, and ably prepared, to meet the whole case, and accurately pursued the views of Parliament: and it charged, therefore, as the crime, the conspiracy

to hold this specific convention for the traitorous purposes assumed by the reports. The questions of fact, therefore, submitted to the jury, were whether the defendants compassed and imagined the King's death? and, whether in pursuance of that traitorous purpose they conspired to hold a convention, which convention should assume the functions of Parliament? and whether they conspired to provide arms for that traitorous purpose? and, whether they published the various papers published in the reports, with the traitorous purpose, *i. e.* either to hold a convention for the traitorous purposes charged; or, to levy war and rebellion generally against the King? The grand jury, which sat, like the House of Commons, on *ex-parte* evidence only, found the bill. Indeed they were differently situated from every other grand jury; for they had before found the bill by their representatives in Parliament. And, independently of that legal fiction they were bending beneath the authority of the King, and the two Houses of Parliament: whose pre-judgment had loaded the press for months together; and upon this charge, with greater difficulties to struggle with than I ever recollect in my private practice, the parties were put upon their trials. They severed in their defences; the Crown had its election, whom it would try first; and Hardy was fixed upon, on every principle which could guide professional men in the exercise of a great public duty: for he might be said to be privy to what I call the whole body of the evidence. The case of Hardy was opened by the Attorney-General, who had been an active member of the House during the conjuncture which

led to the trials, and a member of the secret committee ; who, besides, attended the King's ministers assembled in council ; who was present at all examinations ; and who, added to these advantages, had, I believe, inspected and studied every paper the most remotely connected with the cause ; and who was more master of all their bearings than I could have supposed the human mind capable of containing, above all learned and intelligent men, upon such trash as this House had set it to work on.

I am prepared to show, by the sequel of the proceedings, that the juries by their verdicts have, not merely by probable inference, but almost directly and technically, negatived the existence of the conspiracy, upon which the suspension of the Habeas Corpus avowedly was founded. In order to establish this, the Attorney-General had divided the cause into three branches ; first, whether the treasonable conspiracy charged by the reports, and which was made the foundation of the indictment existed at all in any body. Secondly, whether the prisoner Hardy, had a share in it ? Thirdly, what was the legal consequence of the establishment of these two propositions of fact ? On offering the first branch of the evidence, I objected to reading the writings, and proving the acts of a great number of persons scattered throughout the kingdom, most of whom, indeed most of whose existences, were unknown to Mr. Hardy. I insisted that the connexion between the actors and writers with the prisoner should first have been established, before the minds of the jury should be affected by their actions or their writings. I did not

mean to argue that point, or to consider its legality : it was enough for me, that it was over-ruled by the court, because it let in the whole evidence which the House had collected—every thing in both reports, and a hundred times more : all that any man in any society in England and Scotland, professing the objects of reform, had done, or written, or said ; even the whole or the most material part of the evidence against Watt, at Edinburgh ; Watt, the spy of government, who was hanged to set the thing a going. If the prisoner's counsel had prevailed in their objection, it might have been said, with some air of truth, that the jury had not before them all the materials for judgment, which had been before the House ; or, if any technical legal objection had been successfully made, to the relevancy or admissibility of any part of the report, the same thing might have been said : or if it had been said before the jury *alio intuitu* ; if it had been offered as proof of a criminal disposition in the prisoner Hardy, and not of a general conspiracy, the same plausible argument might have been employed ; but I undertook to show, first, that the whole report, or as much of it as the Attorney-General thought suitable to the purpose, was received in evidence at the trial, that no objection prevailed against it, and that it was given in evidence directly and technically to establish the very proposition predicated by the House in its report : so much so, that the Chief Justice, following the arrangement of the Attorney-General, expressly and repeatedly stated to the counsel and the jury, that the general evidence was not evidence which

could affect the prisoner, unless afterwards brought home to him ; but that it was received to establish the existence of a conspiracy, without which he could not have conspired, viz. a conspiracy to hold a convention for the subversion of the constitution, which the indictment charged ; the identical specific conspiracy asserted in the preamble of the suspending statute, founded upon the report of the two Houses of Parliament. It was plain from this view of the trials, that the major proposition of fact, without which neither any secondary matter of fact, as affecting the individual, or any matter of law for the court to consider of, could arise, was the belief of the jury, that a general conspiracy, such as the indictment charged, existed some where. The Lord Chief Justice had expressly put the cause in that way, in ruling the admissibility of the general evidence on Hardy's trial. He said, that there were two questions of fact, and a legal conclusion if the facts rendered any legal conclusion necessary : first, whether the conspiracy, as charged, existed at all : secondly, whether Hardy was party to it : and thirdly, what was the legal consequence if the two propositions of fact were established—" If," said the Court, addressing the prisoner's counsel, " the jury are convinced of the first, *cadit questio*, your client is not responsible, there is no matter of fact for application to the prisoner, and no law for me to deliver." This statement was undoubtedly correct, since the only way that the debated question of treason could arise was, whether the existence of the conspiracy charged by the indictment, if found by

the jury, did amount either by inference of law, or irresistible conclusion from fact, to a compassing of the King's death? I built this argument upon the foundation of justice to the Attorney-General, which he willingly rendered: for he never contended that a thousand libels on Parliament put together, could amount to the crime charged; nor the most seditious intention of approaching parliament by seditious rioters, tumultuous assemblies; but only that if the prisoners contemplated utterly to subvert the constitutional authorities, including the king's prerogative, thereby destroying the regal office, which no king was likely to survive, that this was a compassing the king's death, without any evidence of a direct conspiracy against his person. Whether this be law or not, is luckily wholly and absolutely irrelevant to the view I mean to take of this question; and, therefore, I protest against giving the House any jurisdiction upon it in this posture of the debate, for very obvious reasons. I have already delivered my opinion on the subject: and though I by no means agree that an advocate is bound in his own person, for any statement of the law as counsel at the bar (a dangerous proposition for the country), yet I voluntarily and solemnly now declare that my opinion went along with all that I delivered upon the trial on the subject, and that I believe it is an opinion which no argument nor any length of time can change. This, however, is a mere digression, as it would be silly to suppose that the House will support my opinion in opposition to that on which it has staked

its character with the country; and I am therefore ready, for argument's sake, to suppose the law to be as the House has declared it; and that upon the matter before the House, when viewed *ex-parte* only, there is a reasonable ground for believing in the supposed conspiracy; because, still the question before the House returns back in its genuine shape, viz. whether after the judicial inquiry, which the House always intended should decide the question, and which could alone decide it, the conspiracy which the House had believed, and, for argument's sake, had reasonably believed, on viewing one side of the evidence, can now be constitutionally believed and acted upon, after decisions founded upon the view of both? To decide this question with incontrovertible force, it is clear to demonstration that the jury could not have acquitted Hardy upon any other principle on earth, consistently with common honesty and common sense, than upon the utter disbelief of the existence of the major proposition of fact, *i. e.* of a conspiracy such as the indictment charged, existing at all. Whoever would read the Attorney-General's opening, which was published by Mr. Gurney,* will see this illustrated with great force. The House cannot complain that its cause was not wholly and entirely laid before the jury; for the Attorney-General, pursuing the views of the House, maintained, and with great ability, first, that a conspiracy such as was charged, to subvert the government, actually existed, and that the whole body of the evidence manifested that specific conspiracy;

* See Vol. II. p. 290-523; and Howell's State Trials, Vol. 24. p. 191.

secondly, that Hardy was a party to it; and, lastly, the conclusion of the law, which as I have observed already, could not arise, till both the facts stood established as a foundation for it. The Attorney-General having maintained the major proposition, by laying before the jury the whole mass of the reports, with a variety of other matter, the benevolent invention of spies, felons, and miscreants, next proceeded to maintain that to which I confess, I saw then, and see now, no possible answer, viz. that, if the conspiracy existed, Hardy was necessarily involved in it; and I never shall forget, if I were to live for ages, the emotion of my mind upon this part of the argument, which I always considered to be invulnerable. I said at the moment to my worthy and learned associate, Mr. Gibbs, that if, stooping under the pressure of prejudice or distracted by the extent of the materials, the jury should be led to suppose that a general conspiracy existed, for which, undoubtedly, there was not the smallest foundation, the guilt of Hardy was a mere corollary; and certainly it was: for, take out the correspondence of Hardy from the evidence and the whole fabric vanishes like an enchantment.—He was secretary of the most active and bold society; he was, in fact, its founder; he composed its original institution; he was the first mover to the convention in Scotland; he was the first mover, also, to the holding of that second convention, the conspiracy to hold which was the charge in the indictment.—Whatever was done, he did: whatever was known, he knew; whatever was in contemplation, he contem-

plated.— If there was a conspiracy, he unquestionably conspired. It fell to my lot to open the case of this unfortunate man; and, if I had known what I should have then felt, I would have shrunk back from it; not from the difficulty of the case, for I thought that nothing, but from the load of prejudice that hung about it. My learned coadjutor and myself having the same opinions, and being resolved to pursue the same course, we had indeed but one, and that was, to grapple with the existence of the conspiracy: for although I did not rashly and madly admit, that the establishment of the conspiracies necessarily involved Hardy, yet I never set about the denial of it, because there were some propositions which no prudent advocate would urge; if I had urged it, I must have lost all credit with the honest and judicious men who were to decide upon my client's life and death. This was so much the case, that the Chief Justice, in summing up, divided the cause into two branches, as it had been before divided upon the arguments for admitting the evidence; and told the jury, that the principal question, and which was a mere unmixed matter of fact, was the conspiracy as charged, and Hardy's share in it; and after having summed up the general evidence, he said, he was sorry to say, that, if that evidence satisfied them that a convention was intended to be held for the purposes charged, the prisoner stood in an awful predicament; for he not only stood implicated in the larger part of it, but it had been but feebly urged by his counsel that he was not. The judge said true: we forbore to

urge it, because we knew that it was not tenable ground. As little reliance had we upon the law as we stated it; for though we were firmly convinced that the defence was invulnerable in point of law, not only by the statute, but even by all the authorities, yet we did not expect that the jury would prefer our statement, as advocates, to the judgment of the Court, whether well or ill founded; but we looked to the great sheet anchor of the cause, viz. the gross falsehood and absurdity of the supposed conspiracy on which we relied, and on which we prevailed. The jury, after retiring a very short time, pronounced Mr. Hardy Not Guilty, to the very general satisfaction of the public, as it was at least generally understood; and the Court adjourned for some days.

On the trial of Mr. Horne Tooke, the Chief Justice, so far from bringing into doubt or question the propriety of the former verdict, reminded us that, in point of technical form, the verdict should be proved; and nothing was hinted from bar or bench, that there was the smallest cause of dissatisfaction. Mr. Tooke being one of the Constitutional Society, most of the addresses to Paine, relative to France, were brought home to him; yet they were found to be perfectly consistent with an attachment to the forms of our own government. And why were they not? How can it be inconsistent with the subject of a free government to congratulate another nation for asserting its freedom, though in a dissimilar form? When shall we get rid of bugbears, which are conjured up for our disgrace and our destruction? The acquittal of Mr. Tooke, I

may observe was a most important place to rest in the matter before the House; it was a great era in the proceedings: in my own opinion, quite decisive of what the House ought to do this day. In order to state what was done with precision, we must first look to see who the persons indicted were, and what was the direct evidence against them. The Attorney-General had properly fixed on, as defendants, those who had taken active steps as members, conferring and co-operating towards holding the convention; for the only persons comprehended in the conspiracy were the members above mentioned, and Mr. Hardy, the secretary to the Corresponding Society. On Mr. Tooke's acquittal, Mr. Joyce, Mr. Holcroft, Mr. Kydd, and Mr. Bonney, the only indicted members of the Constitutional Society, were discharged by consent; and at that period, that their evidence might be given for the next prisoner. On what principle were these four gentlemen discharged? Upon two principles only; by two, I mean two uniting together: first, that Mr. Horne Tooke was honestly and justly acquitted: else his acquittal generated no conclusion in favour of others, who stood in a similar predicament: secondly, that he being innocent, they could not be guilty. And the reason was obvious; for they were engaged in the same object, be it good or evil. The only remaining prisoners under this indictment, were Mr. Thelwall, and the other five members of the Corresponding Society, who were members of the same committee of co-operation; and on the trial of Mr. Thelwall, the Chief Justice found the acquittal

of Mr. Hardy and Mr. Tooke, and the others acquitted by consent, directly in his way: I said the Chief Justice—for none of the jury, nor any of the audience, ever entertained a moment's doubt on any part of the case. And, to be sure, the consequence of the acquittals was irresistible; for how could one individual be conspiring with others acquitted? And how could their innocence and his guilt stand consistent? How could the two societies be innocent, who appointed traitorous committees for traitorous purposes, and who received traitorous reports, if they were traitorous? And how could twelve persons meet for the express purpose of subverting the government, and yet six of them not know what five of the others contemplated? And yet this shameful farce was kept up at an expense ruinous to individuals, until it was fairly beat down by the honest enthusiasm and indignation of the people, which it, in a manner, roused as from a deep sleep.

It only remains to see how all these proceedings affect the case before the House. You have suspended the Habeas Corpus Act on the assumed existence, on *ex parte* evidence, of a specific conspiracy detailed with the greatest accuracy; and you have suspended it for the purpose of judicial trials. You have not convicted one man in England, and you have made the country a scene of triumph at your defeat. Do you mean to go on with the new prosecutions to establish this conspiracy to hold a convention? If you say, yes, you must state the progress:—who are the criminals? what are their numbers? and why are

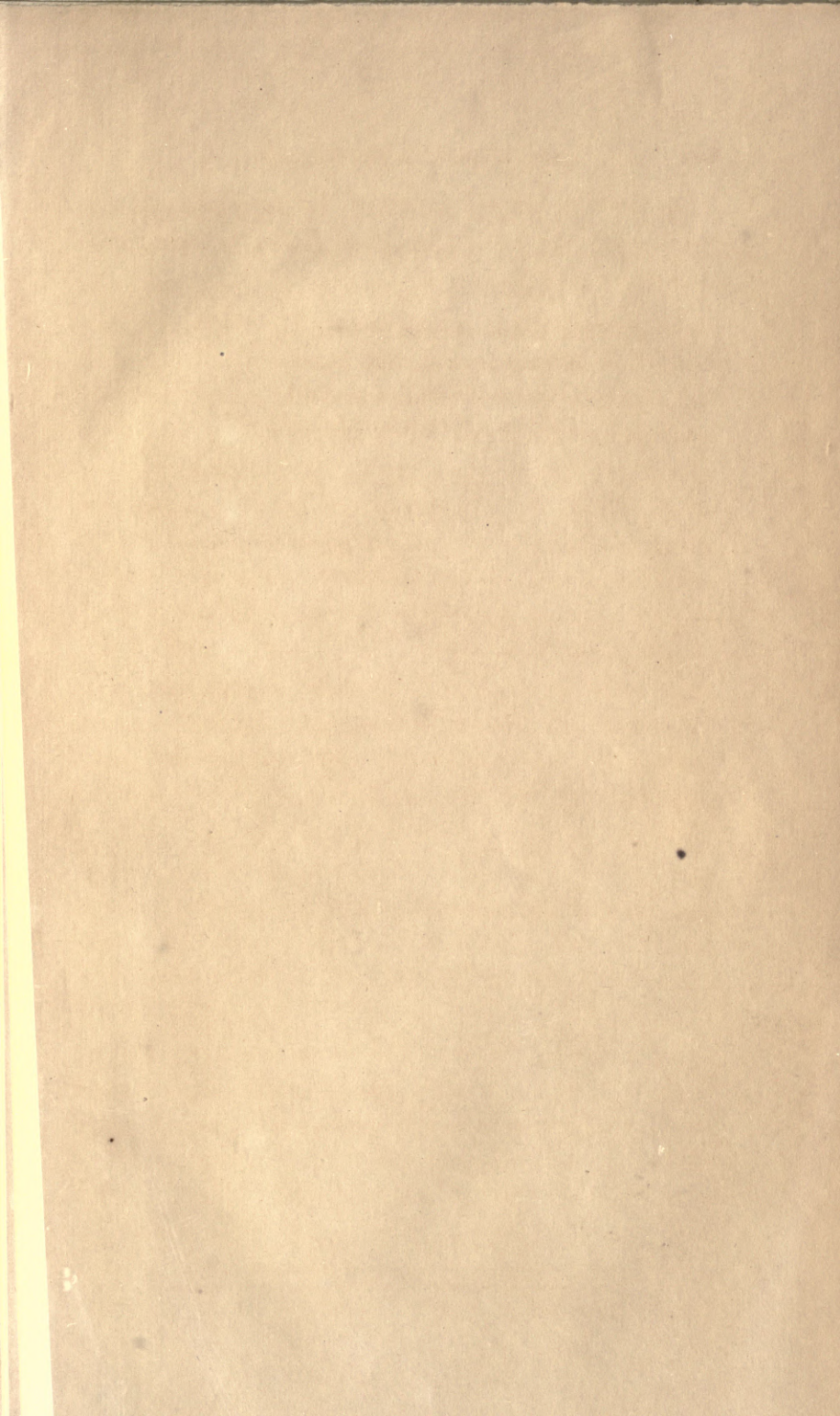
they not now ready for trial? But, supposing you mean to go on, and are still unprepared for trial, the Habeas Corpus Act has no operations on treason which can affect the case; you may postpone the trial, under the wise exception provided in the Habeas Corpus Act, that the prisoner shall not be bailed or discharged, though not brought to trial in the ordinary course, provided it appears upon oath that the witnesses for the crown are absent. Supposing, therefore, that individuals are still suspected of or charged with treason, or even with this specific treason, now that the matter has been so fully and fairly investigated, why can they not be proceeded upon according to law, without a total suspension of the liberties of the whole nation? Why cannot individuals be brought in this as in any other case to justice, without arming the Crown with a dangerous authority, which its ministers, in some of its stages of subordination, would, in the nature of things, abuse, and which cannot be vindicated upon any principle of general utility, or safety? I cannot help thinking that this argument presses more than was conceded, when, notwithstanding the acquiescence of the Crown, the verdicts, without being constitutionally questioned, were sought to be discredited: and because that could not be done with effect, the very trial by jury itself was to be brought into disrepute. The Right Hon. Gentleman who spoke last, instead of speaking to the question, deliberately defended himself against the attacks of Mr. Sheridan, and seemed to think every body bound to subscribe to

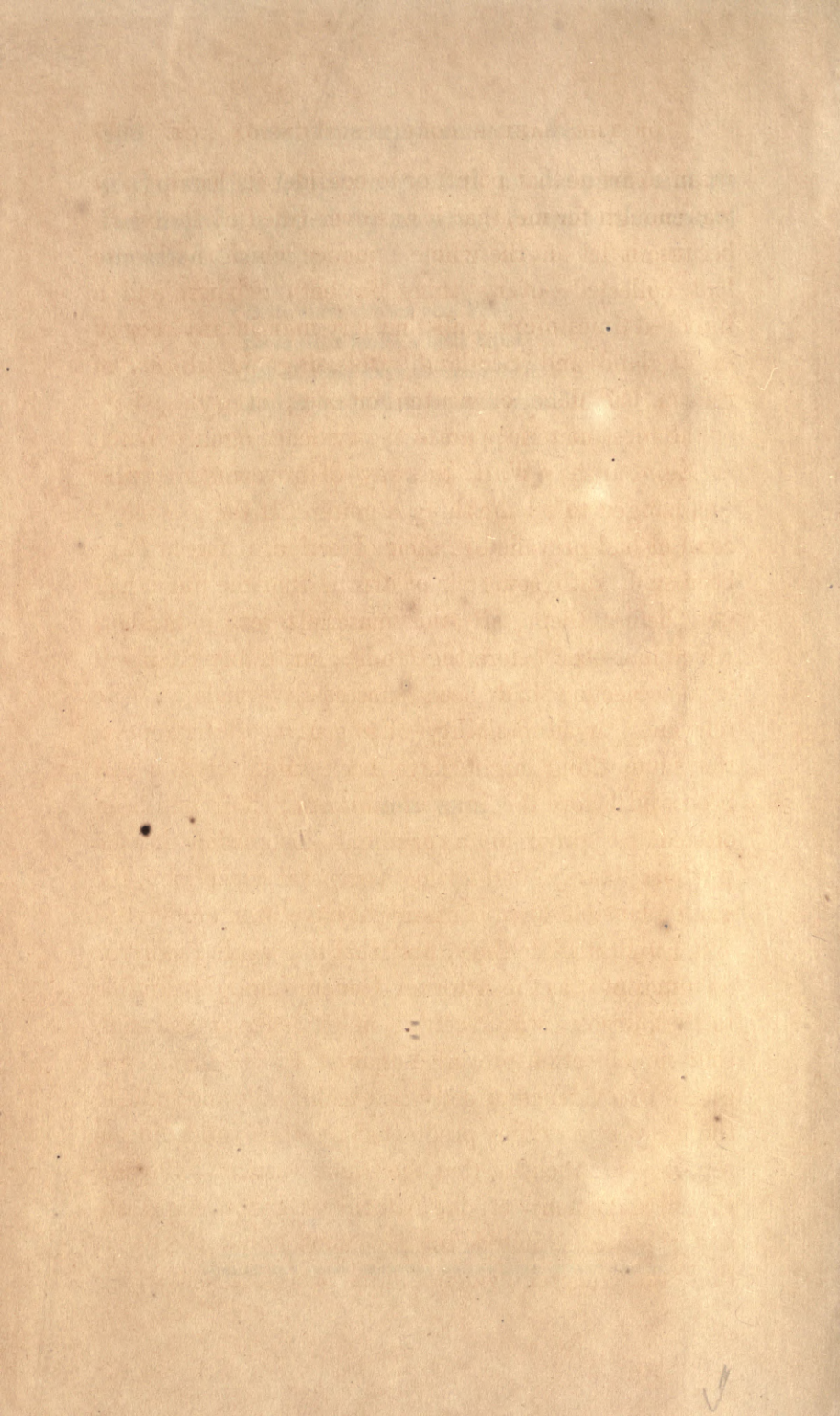
his acquittal upon his bare word : for he had called no witnesses, not even to his character, which was his principal defence. He did not wish to question the Right Hon. Gentleman's defence, even under these circumstances. How much more, then, should he respect the cases of men who had called witnesses, and who had been acquitted by their country ! I am sorry to see these peevish observations in this place ; not because they affect the trial by jury, the value of which is too deeply rooted in the heart of every Englishman, to be impaired by any observations, but because it brings the House of Commons into disrepute, which is already but too much sunk in the estimation of the people.—This consideration leads to the only remaining topic, the policy of rejecting the motion—Is this a time for us to affront and tease the people with groundless jealousies ? We, their servants and their representatives.—If we, instead of sitting here, the popular branch of Government, to protect them, charge them with vague, unfounded conspiracies, let us take care that the charge be not reverberated on us. Above all, let us attend with prudence to the present calamitous conjuncture. If, in consequence, our enemies, whom we affect to despise—with whom we will not, whom, it seems, we cannot treat with—if they should, as perhaps they may, be in a short season upon our coasts to invade us — if the present system continues, who is to defend the country ? Who but this insulted people whom we calumniate ? The people only can do it, and they only will do it, as they feel an interest worth the exertion. Let the Chancellor of the Exchequer attend

to the maxim happily expressed by the poet, and no less happily applied by his great father to the case of alienated America :

“ Be to their virtues very kind,
Be to their faults a little blind ;
Let all their ways be unconfin'd,
And clap a padlock on their mind.”

THE END.







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Erskine, Thomas Erskine
The speeches of the Right
Hon. Lord Erskine

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